Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

S. DENISE GONZALEZ, an individual;
RUBEN C. GONZALEZ, an individual,
Petitioners,

v.

METROPOLITAN TRANSPORTATION AUTHORITY,
aka Southern California Rapid Transit District, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Did the majority of the panel below err when they decided that it was not relevant to the safety sensitive balancing test to consider the fact that more than 99.9% of each plaintiffs' work time was spent at obviously non-safety-sensitive duties, and the remaining tiny percentage of work time was spent on duties which were only marginally safety-sensitive?

Is Plaintiff S. Denise Gonzalez' job position in fact "safety-sensitive", as that term has been defined by the United States Supreme Court, such that it is reasonable under the Fourth Amendment to subject her to random (as opposed to probable cause or reasonable suspicion) drug testing of her urine, when as a bus dispatcher she in no way supercedes the actual driver of the vehicle in controlling the movement of buses, unlike metro rail operators, train dispatchers, or air traffic controllers, for example, and furthermore testified that in 17 years as a dispatcher, only 3-4 had ever been "life or death emergencies", in which case her only role was to contact the appropriate authorities?

Is Plaintiff Ruben Gonzalez' job position in fact "safety-sensitive", as that term has been defined by the United States Supreme Court, such that it is reasonable under the Fourth Amendment to subject him to random (as opposed to probable cause or reasonable suspicion) drug testing of his urine, when his actual duties did not involve controlling buses with passengers and he stayed in the office the vast majority of the time doing administrative work?

Did the Ninth Circuit improperly apply the U.S. Supreme Court's precedents with regard to suspicion-less drug testing to the facts of each Plaintiff's job position to reverse the District Court's conclusion on remand that the suspicion-less testing of each Plaintiff was not reasonable under the Fourth Amendment?

PARTIES TO THE PROCEEDING

The following, and no others, are parties to the instant proceedings:

Petitioners S. DENISE GONZALEZ, an individual, and RUBEN C. GONZALEZ, an individual, who were the Plaintiffs and Appellees in the Ninth Circuit Court of Appeal.

Respondents are the METROPOLITAN TRANSPORTATION AUTHORITY, aka Southern California Rapid Transit District; JOSEPH E. DREW, in his official capacity as present Chief Executive Officer/General Manager and as an individual; FRANKLIN WHITE, in his official capacity as past Chief Executive Officer/General Manager and as an individual; RAY INGE, in his official capacity as present Director of Human Resources and as an individual; and JERRY GIVENS, in his official capacity as past Director of Human Resources and as an individual, who were the Defendants and Appellants below.

The UNITED STATES DEPARTMENT OF TRANSPORTATION and the FEDERAL TRANSIT ADMINISTRATION are also Respondents, who were Intervening Defendants and Appellants below.

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PETITION FOR CERTIORARI

Petitioners respectfully seek certiorari to review the Memorandum filed by the Ninth Circuit Court of Appeals in this matter on August 25, 2003. A Petition for Rehearing by Appellees was denied by 2-1 vote on November 4, 2003.

I.

CITATIONS TO OPINIONS BELOW

The August 25, 2003, Memorandum of the Ninth Circuit Court of Appeal is unpublished, found at 73 Fed.Appx. 986, 2003 WL 22006014 (9th Cir. 2003).

The 1999 opinion of the Ninth Circuit Court of Appeal is found at 174 F.3d 1016 (9th Cir. 1999). Neither district court opinion was published.

II.
JURISDICTIONAL STATEMENT

The District Court for the Central District of California had original subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(3) and (4), this being an action arising under the federal constitution and laws, and under 28 U.S.C. §§ 2201and 2202, this being an action for injunctive and declaratory relief.

The following orders and judgments have been entered in this action since it was first filed in 1996:

1. The District Court granted Defendants' Motion to Dismiss pursuant to Fed.R.Civ.Proc. 12(b)(6) on October 21,

1996, which Order was entered on October 22, 1996. [Appendix G]

A Notice of Appeal of the October 22, 1996, Order was timely filed on November 21, 1996.

2. On April 14, 1999, the Ninth Circuit Court of Appeal entered an Opinion reversing the October 22, 1996, Order and remanding the matter to the District Court. [Appendix F]

3. On May 18, 2001, the District Court entered an Order finding that the claims of Plaintiff Denise Gonzalez were not moot. [Appendix E]

4. On October 26, 2001, the District Court entered summary judgment *sua sponte* in favor of Plaintiffs/Petitioners and enjoined Defendants from applying random drug testing to the Plaintiffs in the job positions analyzed. [Appendix C]

5. On December 12, 2001, the District Court entered a Permanent Injunction in favor of Plaintiffs/Petitioners as well as a Stay Pending Appeal. [Appendix D]

Respondents herein appealed the District Court's May 18, October 30, and December 12, 2001 Orders, over which the Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291, and Federal Rules of Appellate Procedure Rules 1, 4(a), final judgment having been entered as to all claims and all parties.

6. The Ninth Circuit Court of Appeals entered its Memorandum on August 25, 2003, reversing 2-1 the grant of summary judgment to the Plaintiffs by the District Court, although it did affirm the District Court's ruling that Denise

Gonzalez' request for injunctive relief was not moot. [Appendix B]

Plaintiffs/Petitioners filed a Petition for Rehearing and Request for Rehearing En Banc on October 9, 2003.

7. The Ninth Circuit denied that Petition and Request by 2-1 Order of November 4, 2003. [Appendix A]

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution, Section 1:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within the jurisdiction the equal protection of the laws.

49 U.S.S.C. § 5331, Alcohol and Controlled Substances Testing, United States Code Service (Lawyer's Cooperative Publishing, 1996):

[See, Appendix H, attached]

49 C.F.R. § 653.1 (Overview) and 653.7 (Definitions), Michie's Code of Federal Regulations (1996):

[See, Appendix I, attached]

IV.

STATEMENT OF THE CASE

This matter involves the application of U.S. Supreme Court fourth amendment precedent to "random" (i.e., suspicionless) drug testing of certain transportation employees under federal law, and a determination of what types of work are in fact so "safety sensitive" as to override the right to privacy and the right to be free from search and seizure without probable cause. As stated in the federal regulations, "Each employer must decide for itself whether a particular employee performs any of the functions listed in this definition." 59 Fed. Reg. 7301, 7544 (1994) (emphasis added); discussed in, *Gonzalez v. MTA*, 174 F.3d 1016, 1023-24 (9th Cir. 1999).

Random drug testing is different from drug testing for probable cause or that based upon reasonable suspicion, and therefore carries with it a far greater propensity for the violation of one's fundamental constitutional rights. Even

after over a decade of drug testing and analysis, there is no evidence that random drug testing of allegedly "safety sensitive" persons actually improves public safety.

According to the U.S. Dept. of Transportation, Federal Transit Administration's Drug and Alcohol Testing Results 1999 Annual Report, FTA-MA-26-5010-00-1, DOT-VNTSC-FTA-00-06 (December 2000), for example, while reasonable suspicion drug testing nationwide resulting in an average of 9.37% positive test results, random testing resulted in just 1% positives, even though random testing was "by far the most common test to be conducted, with 58.7% of all specimens randomly collected by transit systems, followed by pre-employment testing (25.9%). *1999 Annual Report*, p. ES-2. For alcohol testing, random testing nationwide produced .09% positive results, while reasonable suspicion testing produced an average of 6.27% positives. Out of approximately 4,000[1] drug tests each year, approximately 3,200 of them being random, Defendant MTA has averaged only 24 positive drug test results total.

At trial, the defendants could produce no evidence to show that random drug testing is in any fashion effective to improve public safety in the mass transit industry, defeating one of the factors to be considered in determining the constitutionality of random drug testing overall, not to mention in particularized cases. From 1995-1999 for the Defendant MTA, there were only two positive drug tests of any type for a position even remotely similar to Ruben's (Rail Transit Operations Supervisor, as opposed to Ruben, who is not involved with Rail operations), and none for Denise's

[1] Plaintiffs do not know the total number of drug tests of all types, only the number of positives for each type and the total number of random tests.

position. In that same time period, there were no accidents attributed by the Defendant MTA to either of their positions, from any cause.

On April 18, 1996, Plaintiffs S. Denise Gonzalez and Ruben C. Gonzalez (Gonzalez') filed the instant action, known as *Gonzalez I*, challenging the MTA's random drug test policy as applied to them. Plaintiffs have sought injunctive and declaratory relief and damages against the MTA and several employees responsible for implementing and enforcing the MTA's drug testing program, on the grounds that the MTA's classification of plaintiffs as "safety sensitive", the resultant testing of them without probable cause, and the failure to screen them for the likelihood of severe trauma as a consequence of being tested, violated their civil rights under the United States and California constitutions.

The Gonzalez' are devout orthodox Catholics whose belief in personal privacy and individual rights is fundamental. Both worked or had worked for the MTA for over 20 years each, with exemplary records. In the case of Mrs. Gonzalez, an April 18, 1995, random urine test triggered a debilitating psychological shock grounded in a history of child abuse for which she had been treated in the past.

Mrs. Gonzalez was so traumatized at the time of the urine test that she was required to remain at the medical center where the test was performed for observation, and thereafter required psychiatric treatment for over a year, during which time she was unable to return to work (her constructive discharge is the subject of a separate lawsuit). Mr. Gonzalez has been tested repeatedly since the filing of the instant complaint, over his objection. Both of the Gonzalez' tested negative.

Since the MTA chooses to accept federal funds, its drug test policy was formulated pursuant to the federal Omnibus Transportation Employee Testing Act of 1991 and regulations thereunder, 49 U.S.C. § 5331; 49 C.F.R. Part 653-54 (hereinafter, "Omnibus Act") [Appendix I]. Since the MTA's primary defense to the action is that the federal law mandates their random testing of the instant Plaintiffs, and since the wording of the MTA's policy is nearly identical to that of the Omnibus Act, *Gonzalez I* also consists of an "as applied" challenge to the federal law.

The Gonzalez' argue that the classification of their particular jobs as safety sensitive cannot be justified and that, although infrequent, reactions such as that of Mrs. Gonzalez do occur, although no mechanism exists for screening individuals such as themselves for actual propensity toward severe and debilitating psychological shock and trauma as a result of being testing without probable cause. Balancing the governmental interest with the actual likelihood of harm from Plaintiffs' jobs results in the conclusion made by the trial court in this matter, that random drug testing of Plaintiffs is unreasonable because their jobs are not sufficiently "safety sensitive" defined by the U.S. Supreme Court.

Pursuant to a motion to dismiss by Defendant MTA, the Gonzalez' complaint was initially dismissed on October 18, 1996, on the grounds that the MTA's drug test was presumptively constitutional because it was undertaken according to the Omnibus Act. The Gonzalez' appealed that dismissal and on April 14, 1999, the Ninth Circuit reversed and remanded the action to this Court for further proceedings, stating that the district court "could not simply defer to the administrative agency's determination that dispatchers perform a safety sensitive function", but rather must hear various kinds of particularized factual evidence in order to

judge the reasonableness of the testing. *Gonzalez v. MTA*, 174 F.3d 1016 (9th Cir. 1999).

After having been ordered by the Ninth Circuit appellate panel to conduct a balancing test based upon all the facts and circumstances of the Gonzalez' employment, the District Court did so and then entered summary judgment in the Gonzalez' favor, finding that Plaintiffs' jobs are not in fact sufficiently "safety-sensitive" as defined by U.S. Supreme Court precedent to warrant random testing. The Ninth Circuit appellate panel reversed as to both Denise Gonzalez and Ruben Gonzalez, in a 2-1 decision, and denied the Gonzalez' Petition for rehearing by the same 2-1 vote.

V.

REASONS FOR GRANTING THE PETITION

A. Introduction and Summary of Argument

The Gonzalez' contend that the reversal of the district court by the appellate panel erroneously turns on the creation by the appellate panel of an imaginary scenario in which the Gonzalez' jobs consisted *entirely* of *always* doing the most dangerous thing either of them ever has to do at their job, when in fact the most dangerous thing either of them ever has to do is done less than one hour per year for each[2]. In effect the appellate panel turned the Supreme Court's balancing test into one of, "If a person were required to do the most dangerous possible thing that their job entails for all of the approximately 2000 hours per year that they work, *then* would that job be safety sensitive?"

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[2] *See, Answering Brief, pp. 12-22; ER- 66-68, 73-77, 88, 92, 105-107, 111, 115-118, 125-129, 441, 433; SER- 73-79, et al.*

This is the antithesis of the *actual* test promulgated by the Supreme Court, which the Gonzalez' contend was devised to protect against just such a result. While the Supreme Court has not required that an actual actuarial study by conducted for each job position to determine the specific risk posed by each employee's total job duties, it has made it clear that the balancing test is to be done in a rational manner.

While there are some rare job duties that are so hazardous that even the briefest momentary lapse in concentration or a corrupted decision may result in a disaster of such magnitude that the job is intrinsically safety-sensitive, the Gonzalez' jobs are not among them. Nor or the Gonzalez' at the "intermediate" level of risk, where the overall risk in their jobs is significantly higher than average, and the risk exists during all of the employee's working hours.

The job duties which generate the highest risk for the Gonzalez' are driving an empty bus (for Rubin), which he did for less than one hour per year, if that, and handling the exceedingly rare emergency call (for Denise), which happened only 3-4 times in 17 years and even then all she had to do was call the police or ambulance from a room with a half-dozen other people. [*See, Appendix F, Dissent.*] According to the evidence weighed by the trial court, the percentage of each of the Gonzalez' total work hours in which their jobs were *actually* safety-sensitive under the relevant definitions is approximately 1/10 of 1% (.1%) of their total work hours.

For the appellate panel to hold that the percentage of time the Gonzalez' spent engaged in the higher risk job duties is not a factor to be considered is simply illogical and defeats the whole point of the Supreme Court's balancing test. If the appellate panel's rendition of the test were to be applied to the

general public, *anyone* driving a car anywhere at anytime could be randomly drug tested without probable cause, simply because occasionally they are called upon to react to or avoid an emergency situation, be it another car or a bunny in the road.

B. The Appellate Panel Changed The Supreme Court's Balancing Test And Fundamentally Erred In Balancing Appellees' Protected Privacy Interests With The Government's Needs

Under the legal standard reiterated in *AFGE v. Cheney*, 754 F. Supp. 1409, at 1419 (N.D. Cal. 1990), relied upon by the appellate panel, there must be a "markedly more compelling government interest in an environment of markedly reduced privacy expectations". *See also, United States v. Kincade*, 03 C.D.O.S 8835 (9th Cir., Oct. 2, 2003) (DNA testing of inmates without probable cause violates Fourth Amendment). One compelling interest is the enhancement of public safety. But, as stated in *AFGE v. Cheney*, "safety risks must be of sufficient magnitude for the government to have a compelling interest in reducing them". The classic example is workers in nuclear power plants. *See, Rushton v. Nebraska Pub. Power Dist.*, 844 F 2d 562 (8th Cir. 1988).

Thus to be reasonable under the Fourth Amendment, a drug testing ordinarily must be based on individualized suspicion of wrongdoing. *See, City of Indianapolis v. Edmond*, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000). While any suspicionless drug testing in principle is unreasonable under the Fourth Amendment, this principle weighs even heavier with regard to random drug testing because random drug testing lacks any nexus to any particular individual.

Under these principles, the U.S. Supreme Court in *Skinner v. Railway Labor Exec. Ass'n*, 109 S.Ct. 1402, at 1419, 489 U.S. at 628 (1989) found compelling interests in testing railway employees, including train operators, because employees "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences" resulting in "great human loss".

The 9th Circuit has echoed this language for example *in Int. Brotherhood of Electrical Workers v. Skinner*, 913 F2d 1454, at 1463 (1990), where the Court determines "the possibility of a catastrophic accident" into its balancing analysis. Similarly, the Court found such "safety-sensitive" work in cases of testing airline employees, *see Bluestein v. Skinner*, 908 F.2d 451 (9th Cir. 1990), and cases of testing professional truck drivers, who at virtually all times in their work drive trucks weighing 26,000 pounds which may be loaded with extremely hazardous substances. *See, Int. Brotherhood of Teamsters v. Dep't of Transportation*, 932 F.2d 1292, 1299 (9th Circuit 1991).

In a recent decision, the U.S. Supreme Court reiterated the integrity of the need for probable cause, i.e. individualized suspicion, in Fourth Amendment searches. *City of Indianapolis v. Edmond*, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000). In *Edmond*, the Supreme Court held that random vehicle checkpoints whose primary purpose was the discovery and interdiction of illegal narcotics via observation by officers for signs of driver impairment and "particularized suspicion" with respect to the stopped vehicle were unconstitutional in violation of the Fourth Amendment.

Although in *Edmond* the Supreme Court affirmed the validity of the *Sitz* decision in which the court upheld brief, "25-second" stops to look for signs of drunkenness in drivers

in the interest of public safety, *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990), it pointed out that the objective intrusiveness of such a stop (unlike a urine test) was extremely minimal. In the instant action, the providing of bodily fluids containing information about a person's entire genetic makeup and physical well-being is the opposite of the minimal 25-second car stop. "[I]n our culture the excretory functions are shielded by more or less absolute privacy, so much so that situations in which this privacy is violated are experienced as extremely distressing, as detracting from one's dignity and self esteem." *Privacy*, 77 Yale L. J. 475, 487 (1968), cited in *Skinner*, dissenting opinion, 489 U.S. at 646. "There are few activities in our society more personal or private than the passing of urine." *Van Raab*, 816 F.2d at 175 (1987).

In the instant case there is no claim of individualized suspicion, therefore the issue is whether or not the ***random*** testing of Ruben and Denise is necessary to improve the public's safety, beyond the normal need for probable cause testing. While some of the key factors, such as the drug testing procedures utilized, weigh in the government's favor, the majority of them weigh in Plaintiffs' favor so as to support Judge King's decision to grant summary judgment in favor of Plaintiffs.

In reversing Judge King, the appellate panel had to effectively change the test. Under the correct formulation of the test, as stated by the Ninth Circuit in its previous ruling in this case in 1999, it is necessary to consider all of the following factors in light of the specific facts, as the trial court properly did:

- whether either Plaintiff in fact "'control[s] ... movement' of a bus" (Mrs. Gonzalez certainly

does not, Mr. Gonzalez drove an empty bus for one hour in all of 1999 [ER-434-436]);

- the physical risk to passengers if either were to be impaired (none from either Plaintiff [ER-437]);

- whether each is otherwise subject to comprehensive physical exams (only Ruben is, just once every two years [ER-430]);

- whether their positions have traditionally been subject to extensive safety regulation ("Neither side presents evidence which indicates that bus dispatchers or instructors have been subject to extensive regulation for safety. Therefore, Plaintiffs do not have a diminished expectation of privacy due to regulation." [*Judge King's Order, p.3* @ ER-430]);

- whether they are performing primarily administrative duties (as Ruben does [ER-435, 441]);

- whether they have been shown to have a high incidence of severe drug abuse in their positions (They have not: "The government has not shown why its interest in safety would be jeopardized by requiring reasonable suspicion, as opposed to suspicionless random testing of Denise and Ruben" [ER-437]) or industry ("Defendants' failure to document drug use among transit employees does not preclude random drug testing, it is merely another factor to consider." [ER-439]);

- whether the testing procedures would be reasonably effective in determining if a person were impaired (the random tests do not actually determine impairment, according to discovery from Appellants [SER-000081-95, 000113-119]);

- whether the random testing of someone in the particular positions in fact affects safety at all (Plaintiffs assert that there is no evidence that random testing positively enhances public safety in terms of accidents at all, and Appellants admit that there is no actual evidence that random testing has improved public safety in over a decade of testing. Judge King noted "Defendants' failure to prove that the testing at issue has improved safety", although he held that this failure did not preclude testing. [ER-439]);

- whether probable cause determinations would be impractical, as in *Skinner*, because there is difficulty in subjecting the employees to day to day scrutiny (See, *Chandler at 321, Van Raab, supra.*) (they would not, since both Plaintiffs work with others and are closely observed. [ER-437, ¶ 2]);

- whether the tests as performed were an undue invasion of privacy (the tests were performed in a relatively low level of intrusiveness [ER-430-431]); and

- the Bayes Theorem problem affecting random tests given to low incidence populations (according to discovery responses only 1% of the MTA's total drug tests are positive, a low incidence rate,

however no error rate was provided in discovery responses)

Gonzalez v. MTA, 174 F.3d at 1021 - 1023; *Skinner v. Railway Labor Exec. Ass'n*, 109 S.Ct. 1402, 489 U.S. at 628 (1989); *Chandler v. Miller*, 520 U.S. 305, 117 S.Ct. 1925, 137 L.Ed.2d 519 (1997); *National Treasury Employees Union v. Van Raab*, 489 U.S. 656, 109 S.Ct.1384, 1399 - 1401, 103 L.Ed.2d. 685 (1989); *Veronia School Dist. 47J v. Acton*, 515 U.S. 646 (1995).

The appellate panel's departure from the standard test occurred in the appellate panel's refusal to take into account the actual exceedingly low percentage of time that the Gonzalez' have even a possibility of unusual impact on public safety, and giving that unusual possibility vastly more weight than any other factor or even all other factors combined.

In the pending case, any unusual possibility of a catastrophic accident affecting the public is lacking. Even if Denise Gonzales should have failed to properly make one of the 3-4 emergency calls she had to do in 17 years at her job, for example, this would not have disastrous consequences similar to the consequences in the cited cases given the myriad backup measures and her limited role in and control over any emergency. If an accident occurs in the street in front of a person's house 3-4 times in a 17 year period, and that person fails to call 911, does that make them a public safety hazard who should be drug tested?

Even when Ruben Gonzalez drives a bus, less than one hour per year if that, he drives it without passengers and in a limited area. 99.9% of the time he sits at a desk doing paperwork when he is on the job. He fulfills an administrative job that is not comparable with a commercial truck driver, a

pilot, or a nuclear power plant employee, and therefore it is extremely improbable for him to create catastrophic accidents.

The Gonzalez' jobs are simply not "safety sensitive" within the meaning of that term as used by the United States Supreme Court, regardless of the general definition delineated by the Secretary of Transportation in the Code of Federal Regulations. Plaintiffs do not engage in work that is more dangerous to themselves or to others than the majority of the American workforce, particularly those who commute to and from work.

The possibility of a mistake by an air traffic controller directing two 747's onto the same runway at the same time is real and the danger constant, rather than speculative, whereas the bus drivers (not the instructors or dispatchers) control their own destiny. Mistakes by any employee with access to critical safety areas of nuclear power plants carry with them the possibility of holocaust. A railway or subway dispatcher has the ability to send trains loaded with hundreds onto the same track heading directly toward each other, unlike bus dispatchers, who do not actually direct the movement of the buses but can only suggest standard detours.

Plaintiff Gonzalez' job is simply not comparable to those which the Courts have found to be so dangerous as to justify taking away fundamental liberties. Compared with most workers' safety responsibilities, the Gonzales' jobs seem quite average. Virtually every job, even minimum wage jobs, carry with them some responsibility, call for judgment, and potential for emergency which if not met can have serious or fatal consequences.

The individuals working at a fast food franchise have to avoid selling undercooked meat lest, as has happened,

hundreds are made ill and some killed by food poisoning. The failure to properly clean the inside of a tank truck previously used to carry uncooked eggs made tens of thousands seriously ill when the ice cream concentrate carried next in that truck became contaminated by salmonella bacteria. Virtually every clerk or judge in the court system could make a mistake that would set a murderer free. The media brings us a constant stream of horrifying incidents. But despite our desire for a perfectly safe world, these horror stories do not justify taking away from every American worker the full protection of the Fourth Amendment.

Plaintiff Gonzalez' job duties as they have been conducted for years simply do not rise to the level of immediate risk of substantial public harm necessary to warrant the classification of either of them as a safety-sensitive employee. It is not the role of drug testing to be primarily symbolic of the national interest in the war on drugs; the Fourth Amendment privacy right invaded by random drug testing, in particular, is far to great to allow such a situation. *See*, *Skinner*, 489 U.S. at 635, dissent by Marshall and Brennan. In the words of Justice Scalia in his dissent to the *Van Raab* majority opinion:

> An even more apt quotation from that famous Brandeis dissent would have been the following:
>
> > "[I]t is . . . immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on out guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest

> dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928).
>
> Those who lose because of the lack of understanding that begot the present exercise in symbolism are not just the Customs Service employees, whose dignity is thus offended, but all of us – who suffer a coarsening of our national manners that ultimately give the Fourth Amendment its content, and who become subject to the administration of federal officials whose respect for our privacy can hardly be greater than the small respect they have been taught to have for their own.

Van Raab, 489 U.S. at 687.

The appellate panel compared the plaintiffs' duties, as already stated above, to commercial truck drivers, flight instructors and dispatchers, employees on gas pipelines and even employees working at a nuclear power plant. It did not determine the legitimate governmental interests concerning the plaintiffs duties, and even went so far as to state that, "past experiences do not determine whether an employee may be called upon to perform a vital safety function more often in the future".

If the mere speculative possibility of future 'vital safety functions", when it has never occurred in the past, is enough to override Fourth Amendment protections, what is the point of the Fourth Amendment? Surely history is a far more useful guide to determining the likelihood of certain events than "the sky might fall" predictions based in no historical or scientific fact whatsoever. The fact is that the nature of plaintiffs' duties have been defined both by their job

descriptions and historical fact, and they only perform vital safety functions as an *exceedingly* rare exception, and then only arguably so, and thus such functions will never be a stable characteristic of their duties and should not be used as a basis for their random drug testing.

By declaring random drug testing constitutional in this case, the appellate panel ignored that presumptively random drug testing is unreasonable under the Fourth Amendment. In doing so, it made the exception become the rule, which means an undermining of fundamental constitutional rights.

C. The Appellate Panel Erred In Holding That The Frequency Of Performing "Safety-Sensitive" Tasks Is Irrelevant To The Supreme Court's Balancing Test

As mentioned, the appellate panel's decision is largely based on their opinion that the question of how frequently one actually performs safety-sensitive tasks is irrelevant. This opinion is not based on any precedent beyond the Ninth Circuit, and it is even then only valid in cases where the level of "occasional dangerousness" is so unquestionably and absolutely high that the issue of frequency loses its weight when compared to the potential damage that could be caused by a "momentary lapse", for example. This does not fit in the pending case.

In *AFGE Local 1533 v. Cheney*, 944 F.2d 503, 506 (9th Cir. 1991), the Ninth Circuit stated that in cases of top secret access clearances the frequency with which one is likely to be exposed to classified information is irrelevant. In the pending case, neither of the Gonzalez' is performing tasks similar to having access to top secret information. Neither Appellee ever reaches a similar level of dangerousness in his job.

In *Int'l Brotherhood of Electric Workers v. U.S. Nuclear Reg. Comm'n*, 966 F.2d 521, 526 (9th Cir. 1992), the court upheld drug testing of all clerical workers at a nuclear power plant. This was because of the workers' diminished expectation of privacy, the catastrophic nature of accidents, and the Court's inability to distinguish between those workers who posed a real threat to the public and those who did not. The Gonzalez' do not have substantially diminished expectations of privacy, neither of them can cause accidents of catastrophic nature, and the Court does have enough information to determine the extent of their threat to the public, all unlike the nuclear power plant case, for example.

Furthermore, in *Int. Brotherhood of Teamsters*, the Ninth Circuit *did* show that the frequency of performing safety-sensitive tasks is of course an important parameter in deciding whether the government has a compelling interest in random drug testing, contrary to its comments in the instant decision. In that case the court upheld random drug testing on commercial truck drivers because of *the multitude of drivers at any time*:

> While a single accident may not imperil as many lives as a single airline or train crash, the vast numbers of drivers on the road at any given time multiplies the danger to motorists and raises the FHWA's concern for transportation to the level of a compelling governmental interest.

At the time of the decision it was estimated that three million truck drivers would be tested under the FHWA's program. This is a multitude of drivers doing daily drives, and therefore the court inherently recognized that the *frequency* of their activities present a danger that is simply not comparable to the case of the Appellees.

Lastly, the appellate panel wrote that, "If an injunction were in place, neither could be tested regardless of how much of an impact their job duties had on public safety." The Gonzalez' contend that this is a uniquely frightening statement in light of Fourth Amendment jurisprudence, and also absolutely untrue.

First, if their job duties changed substantially from that which they were for the past twenty years or so, an improbable scenario, then grounds might exist for modifying or dissolving the injunction. Ironically, however, a 2003 MTA Drug and Alcohol Program Bulletin provided to the Gonzalez' states that Denise Gonzalez' job position of Transit Operations Emergency Dispatcher has already been removed from the safety-sensitive list, despite the MTA's arguments that it couldn't possibly stop treating Emergency Dispatchers such as Mrs. Gonzalez as safety sensitive due to the mandates of federal law. Unless she can succeed in this appeal, however, Mrs. Gonzalez' seven years of litigation of this matter will result in no actual benefit to her, even though her previous job position is no longer randomly drug tested.

Second, the statement ignores the fact that this case is only talking about *random* drug testing - of course they could still be tested should there be any individualized suspicion or probable cause.

D. This Case Involves Matters of Wide Public Concern

The class of employees to which each of the Gonzalez' belong are defined by a federal law that applies to all transportation workers nationwide. This matter involves the intersection of the federal Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C. § 5331; 49 C.F.R. Part 653-54, which lists certain types of transportation workers as

safety-sensitive, with the mandate of the federal regulations promulgated thereunder: "Each employer must decide for itself whether a particular employee performs any of the functions listed in this definition." 59 Fed. Reg. 7301, 7544 (1994) (emphasis added).

Prior to the appellate panel's decision in this case, the test to be applied in making the constitutional analysis, as stated and restated by the U.S. Supreme Court, was relatively clear and consistent. The Ninth Circuit in this case has modified and largely ignored the parameters of the balancing test, and prevented the Gonzalez' from receiving the benefit of their nearly eight years of litigation even though Mrs. Gonzalez' position, for example, is no longer considered safety sensitive by her prior employer.

The Ninth Circuit's new rendering of the factors to be considered in random drug testing cases deeply undermines the very foundation of this Supreme Court's protection of Fourth Amendment constitutional rights.

VI.

CONCLUSION

The Gonzalez' respectfully request that this Court review the decision of the Ninth Circuit in this case and grant this Petition for Writ of Certiorari.

Respectfully submitted this ____ day of February, 2004.

FOSBINDER & FOSBINDER
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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Case No. 02-55037

[Filed Nov. 4, 2003]

S. DENISE GONZALEZ, an individual; et al.,	)
Plaintiffs- Appellees,	)
	)
v.	)
	)
METROPOLITAN TRANSPORTATION AUTHORITY, aka Southern California Rapid Transit District; et al.,	)
Defendants - Appellants.	)
	)

ORDER

Before: BOOCHEVER, KLEINFELD, Circuit Judges, and Tanner, Senior Judge.

Judges Boochever and Tanner vote to deny the petition for rehearing. Judge Kleinfeld votes to grant the petition for rehearing. Judge Kleinfeld votes to deny the petition for rehearing en banc and Judges Boochever and Tanner recommend rejection of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed.R.App. P. 35.

The petitions for rehearing and rehearing en banc are denied.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Case No. 02-55037

[Filed Aug. 25, 2003]

S. DENISE GONZALEZ, an individual; et al.,
Plaintiffs - Appellees,

v.

METROPOLITAN TRANSPORTATION AUTHORITY, aka Southern California Rapid Transit District; et al.,
Defendants - Appellants.

S. DENISE GONZALEZ, an individual; et al.,
Plaintiffs - Appellees,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION; et al.,
Intervenors - Appellants,

METROPOLITAN TRANSPORTATION AUTHORITY, aka Southern California

Rapid Transit District; et al.,
Defendants.

**Appeal from the United States District Court
for the Central District of California
George H. King, District Judge, Presiding**

**Argued and Submitted July 24, 2003
Pasadena, California**

MEMORANDUM*

Before: BOOCHEVER, KLEINFELD, Circuit Judges, and TANNER, District Judge.**

In 1996, Denise and Ruben Gonzalez, employees of the Los Angeles Metropolitan Transportation Authority ("MTA"), challenged the constitutionality of random drug and alcohol testing, seeking damages and declaratory and injunctive relief. The district court dismissed their complaint for failure to state a claim. We reversed and remanded. Gonzalez v. MTA, 174 F.3d 1016, 1020 (9th Cir. 1999). On remand, the district court granted summary judgment for the Gonzalezes and entered a permanent injunction barring random drug testing of Denise or Ruben. (Their claims for declaratory relief and damages have been stayed in the district

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.

court pending this appeal.) The MTA and intervenors the United States Department of Transportation appealed. We review the district court's grant of summary judgment de novo, see Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1175 (9th Cir. 2002), and we now reverse the district court's grant of summary judgment.

I. Mootness

The MTA argued that Denise's request for injunctive relief was moot because she left her job with the MTA in 1997 and moved to Arizona, where she and Ruben bought a home in 2000 after selling their home in California. Ruben continues to work at the MTA and divides his time between Arizona and California. Denise testified that she would "definitely" return to her job and move back to Los Angeles to rent a home if her job became available to her and if the random drug testing were ruled unconstitutional. [ER p. 335] The district court found that Denise's claim for injunctive relief was not moot. We review de novo, see id. at 1173, and we agree.

"[A] case is moot only where no effective relief for the alleged violation can be given." Forest Guardians v. U.S. Forest Serv., 329 F.3d 1089, 1094 (9th Cir. 2003). "The party asserting mootness has the heavy burden of establishing that there is no effective relief remaining for a court to provide." Oregon Advocacy Center v. Mink, 322 F.3d 1101, 1116-17 (9th Cir. 2003) (quotations omitted). Although it is close, we conclude that the MTA has not met that burden. Denise's sworn testimony is that she will return to California if she can work at the MTA without being subject to random drug testing. A permanent injunction against such testing would be effective relief as to Denise. The MTA relies on Monahan v. Nebraska, 687 F.2d 1164 (8th Cir. 1982), but in

that case the court found that a case regarding educational placement was moot where parents had sued on behalf of a child who had turned eighteen, married, left the defendant school district, and stopped attending school altogether. Her vague statement that she would return to the district to pursue her education, without an indication of when this would occur, made her return "speculative" and her case moot. Id. at 1168. In this case, Denise has unequivocally testified that she will move back to California and seek to return to her job if she will not be subject to random testing.

II. Random drug testing

Federal regulations issued under the Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C. § 5331, require random testing of mass transit employees in "safety-sensitive functions," including anyone who operates a "revenue service vehicle" such as a city bus, including when not in service, or who "[c]ontrol[s] dispatch or movement of a revenue service vehicle." 49 C.F.R. § 655.4. Under these regulations, the MTA tested Denise, a bus dispatcher, and her husband Ruben, a "transit operations supervisor/instructor." Our prior decision reversed the district court's dismissal of the Gonzalezes' challenge to the testing, and remanded their claim that the tests violated their rights under the Fourth Amendment, because we did not have sufficient information regarding what the Gonzalezes' jobs entailed or the effectiveness and privacy of the testing procedure. See id. at 1024.

On remand, the district court considered the three factors that must be balanced when evaluating "special needs" drug testing: (1) the nature of the privacy interest involved; (2) the character of the intrusion; and (3) the "nature and immediacy" of the government's need for testing and the efficacy of the

testing for meeting it. See Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 657-60, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995). The court found that Ruben had a slightly diminished expectation of privacy, although Denise did not, and that the tests were performed in the least obtrusive way possible and were quite reliable. The only remaining issue was whether the safety aspects of the Gonzalezes' jobs justified the intrusion on their Fourth Amendment rights.

It was not disputed that the Gonzalezes' job descriptions called for them to perform, or to be ready to perform, safety-sensitive duties, and the Gonzalezes do not argue that their job descriptions were inaccurate. Denise's dispatch duties included responding to emergencies and calling the police when necessary. Ruben was required to hold a commercial drivers' license with an endorsement allowing him to carry passengers, and to be prepared to drive a bus under a variety of circumstances. Nor was it disputed that they had been called upon to perform those duties in the past. Nevertheless, the court granted the Gonzalezes' cross-motion for summary judgment and granted the request for a permanent injunction against their testing, holding that because the Gonzalezes had only infrequently performed some of their safety-sensitive duties, their jobs had only a "minimal" impact on safety and the intrusion on Fourth Amendment rights could not be justified.

This result cannot be squared with our precedent. This court has upheld as constitutional random drug testing of employees who may be called upon to perform safety-sensitive tasks, regardless of frequency. In Int'l Bhd. of Elec. Workers, Local 1245 v. United States Nuclear Reg. Comm'n, 966 F.2d 521, 526 (9th Cir. 1992) we upheld random testing of clerical workers in protected areas of a nuclear plant where their union could not establish that workers "did not engage

in any safety-sensitive work" (emphasis added). It was enough that "at least some" of the workers entered vital areas and "may have safety-related responsibilities." Id. In AFGE Local 1533 v. Cheney, 944 F.2d 503, 506 (9th Cir. 1991), we upheld the random testing of engineers who were required to hold top secret access clearances, even though they might not ever actually handle classified information. "Holding the security clearance provides access enough ... Considerations of other characteristics of the employees' jobs, including the frequency with which the employees are likely to be exposed to classified information, are irrelevant." Id. at 506, 509.

The government has a compelling interest in "ensuring the sobriety and fitness of operators of dangerous instrumentalities or equipment." Int'l Bhd. of Teamsters v. Dept. of Transp., 932 F.2d 1292, 1304 (9th Cir. 1991) (upholding random drug testing of commercial truck drivers); see also Bluestein v. Skinner, 908 F.2d 451, 457 (9th Cir. 1990) (upholding FAA regulations requiring random drug testing of flight instructors and dispatchers); Int'l Bhd. of Elec. Workers, Local 1245 v. Skinner, 913 F.2d 1454, 1458 (9th Cir. 1990) (upholding random testing of all employees engaged in operations, maintenance, or emergency response functions on gas pipelines).

We have never found random drug testing of employees who perform safety-sensitive functions to be unconstitutional. The Gonzalezes admit that their job descriptions require them to be prepared to perform safety-sensitive functions, and admit that they have performed safety-sensitive functions in the past. They nevertheless argue that their job history shows that they seldom performed these functions, and that therefore they cannot constitutionally be tested. As we said in Cheney, however, frequency is irrelevant. See 944 F.2d at 509. This is particularly true when we are asked to examine an

individual worker's job history. The Gonzalezes sought an injunction against future testing, based on the infrequency of their past safety-sensitive activity. But past experience does not determine whether an employee may be called upon to perform a vital safety function more often in the future. Denise may encounter more frequent emergencies requiring her dispatch services; Ruben may be required to drive a bus more often. If an injunction were in place, neither could be tested regardless of how much of an impact their job duties had on public safety.

The district court also concluded that Denise's work conditions kept her around other workers and under a supervisor, so that any drug or alcohol use would be readily observable without testing. We have held, however, that "'The heavy supervision of workers does not negate the need for other mechanisms to prevent accidents.'" IBEW v. USNRC, 966 F.2d at 527 (quoting IBEW v. Skinner, 913 F.2d at 1460 n.14).

The Gonzalezes also argue that there is no evidence of a drug or alcohol problem in the transit industry. The Supreme Court, however, "has not required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing." Bd. of Ed. of Ind. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 835, 122 S. Ct. 2559, 153 L. Ed. 2d 735 (2002).

We reverse the grant of summary judgment, and we remand to the district court to grant summary judgment in favor of the MTA on the Gonzalezes' claims for injunctive and declaratory relief and damages.

REVERSED AND REMANDED.

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

In response to our remand of Mr. and Mrs. Gonzalez's cases, the district court did exactly what we asked it to do: it carefully balanced the search's intrusion on the individuals' Fourth Amendment interests against the search's promotion of legitimate governmental interests.[1] The district court ultimately determined that the random drug testing was unreasonable as applied to these two individuals, and thus violated their Fourth Amendment rights. The question is close, but I would accept the measured judgment of the district court.

As a dispatcher for the MTA, Mrs. Gonzalez had no lowered expectation of privacy, and her position could hardly be called "safety-sensitive." Buses do not fly, so even though she may give directions, there is not the kind of safety risk that there would be if she were an air traffic controller. She sits in a room with other people and answers phone calls. As for receiving calls, only three or four times in 17 years did she have to respond to any kind of emergency. When an emergency did occur, her sole responsibility was to call the police or ambulance. In this function, her work is no more safety sensitive than that of a desk clerk at a hotel or a

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[1] As we instructed, the district court considered the following factors: "(1) the nature of the privacy interest upon which the search intrudes; (2) the character of the intrusion; (3) the immediacy of the government concern and the efficacy of the search for meeting it." Gonzalez v. Metro. Transp. Auth., 174 F.3d 1016, 1021-22 (9th Cir. 1999) (citing Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 654-64, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995)).

receptionist at an office. Additionally, she worked in a room full of other dispatchers who would likely see the effects of drug abuse and be able to step in during an emergency, if needed.

Although a closer case, Mr. Gonzalez's job as a bus driver supervisor similarly lacks the kind of impact on safety needed to justify the intrusion of a random drug test. He sits at a desk and works with paper, as we do. When he drives MTA vehicles, he does so in order to get to job sites or test equipment, not to carry passengers. His job description calls for him to be prepared to drive a bus under a variety of circumstances, but he has almost never been required to do so during his lengthy career with the MTA. As a practical matter, his job is no more safety sensitive than the general run of administrative jobs.

We have upheld random drug testing of employees who *may* be called upon to perform safety-sensitive tasks, despite a lack of frequency, but only where the level of dangerousness was extraordinarily high. In International Brotherhood of Electrical Workers, Local 1245 v. United States Nuclear Regulatory Commission, we upheld drug testing of all clerical workers at a nuclear power plant based on the workers' diminished expectation of privacy in a heavily-regulated industry, the catastrophic nature of accidents that could occur at a nuclear plant, and "our inability to distinguish between those clerical workers who pose a real threat to public safety and those who do not."[2] Likewise, in AFGE Local 1533 v. Cheney, we held that engineers working for the Navy who were subject to random testing had a diminished expectation of privacy because of the intrusion they faced in the extensive

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[2] 966 F.2d 521, 525-26 (9th Cir. 1992).

background check required to get top secret clearance.[3] This lowered privacy interest justified an intrusion even where the engineers were unlikely to access top secret information. We held that "a person with a top secret clearance generates sufficiently grave potential risk to national security to make the decision to conduct random urinalysis testing reasonable *regardless of any other attendant circumstances.*"[4]

These cases do not mean, however, that infrequency is irrelevant in every case; it is merely one consideration in the balancing test. The unlikelihood that the Gonzalezes will be required to do something that impacts public safety is particularly relevant here for the lack of other reasons justifying an intrusion into their privacy. Although the MTA has a legitimate interest in testing employees in safety-sensitive positions, we must guard against so lax an interpretation of "safety sensitive" that *all* employees of all kinds can, by reasons of expansive but largely imaginary job descriptions, be required to urinate for testing. I agree with the district court that the record demonstrates that *these particular* MTA employees are not situated to pose a substantial immediate threat to public safety. Bus dispatchers and administrators pose no risk of nuclear meltdowns or national intelligence breach.

Like the district court below, I would hold that the expectation of privacy that the Gonzalezes have in their jobs is not outweighed by the slight impact their jobs could have on public safety, and that random drug testing violates their Fourth Amendment rights.

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[3] 944 F.2d 503, 505, 507 (9th Cir. 1991).

[4] Id. at 506 (citations omitted) (emphasis in original).

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 96-2785-GHK(AJWx)

[Filed Oct. 26, 2001]

S. Denise Gonzalez, et al.,
Plaintiffs

v.

Metropolitan Transportation Authority, et al.,
Defendants

DOCKET ENTRY

PRESENT: Hon. George H. King, United States District Judge

PROCEEDINGS: Cross-Motions for Summary Judgment

This matter is before the court on the above-titled motions. After fully considering the briefs and papers pertaining to this matter, hearing oral argument from counsel on April 23, 2001, and reviewing the parties' post-hearing briefs, we rule as follows:

I. Background

Plaintiffs S. Denise Gonzalez ("Denise") and Ruben C. Gonzalez ("Ruben") filed their complaint on April 18, 1996 against the Metropolitan Transportation Authority ("MTA") and various MTA officials under § 1983. On October 18, 1996, Judge Ideman granted Defendant MTA's motion to dismiss with prejudice. On appeal, the Ninth Circuit reversed and remanded on April 14, 1999. After the Ninth Circuit's remand, the parties eventually stipulated that the Department of Transportation ("DOT") and the Federal Transit Administration ("FTA") be made defendant-intervenors, and the case was assigned to this court. Defendants move for summary judgment. We converted this motion into cross-motions for summary judgment at the April 23,2001 hearing and pursuant to our May 17, 2001 order, allowed Defendants more time to file any additional opposition.

II. Legal Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) . On a motion for summary judgment, the moving party has the burden of demonstrating that there is no genuine issue of material fact, and that it is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). However, on claims where a moving party bears the burden of proof at trial, that party must make an affirmative showing sufficient for the court to hold that no reasonable trier of fact could find other than for that party. Calderone v. U.S., 799 F.2d 254, 259 (6th Cir. 1986). In other words, that

party must establish beyond controversy every essential element of its claims. Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986). On claims where the moving party does not bear the burden of proof at trial, its burden is met by showing that there is an absence of evidence to support the non-moving party's case. See Celotex Corp. v. Catrett, 477 U.S. 317, 325-26 (1986). We presume that the non-moving party's version of any disputed issue of fact is correct. See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987).

III. Analysis

Federal regulations require random drug testing of mass transportation employees who engage in "safety-sensitive function[s]," including operating a revenue service vehicle, even when not in revenue service, or controlling the dispatch or movement of a revenue service vehicle. 49 C.F.R. § 655.4. Denise controls the dispatch of revenue service vehicles. Ruben is sometimes required to operate a revenue service vehicle. Therefore, under the regulations both Plaintiffs perform safety-sensitive functions and are subject to random drug testing. As the Ninth Circuit stated, "[t]he only serious question is whether the regulations are constitutionally permissible as applied to" Plaintiffs. Gonzalez, 174 F.3d at 1019.

It is clear that a urine drug test is a search within the meaning of the Fourth Amendment. Skinner v. Ry. Labor Executives Ass'n, 489 U.S. 602, 617 (1989). The issue, then, is whether these searches are reasonable under the Fourth Amendment. See Chandler v. Miller, 520 U.S. 305, 313 (1997). While a search must ordinarily be based upon a warrant or at least individualized suspicion, an exception exists for searches based on "special needs beyond the normal

need for law enforcement." Id. (citation and internal quotation marks omitted). Here, the government has an interest in safety, which is a need unrelated to law enforcement. Reasonableness, then, is "judged by balancing the search's intrusion on the individual's Fourth Amendment interest against its promotion of legitimate governmental interests." Gonzalez v. Metro. Transp. Auth., 174 F.3d 1016, 1021 (9th Cir. 1999). Gonzalez, citing Vernonia School Dist. v. Acton, 515 U.S. 646 (1995), laid out the factors to consider: (a) the nature of the privacy interest upon which the search intrudes; (b) the character of the intrusion; and (c) the immediacy of the government concern and the efficacy of the search for meeting it. Gonzalez, 174 F.3d at 1021-22.

A. The Nature of the Privacy Interest

As to the nature of the privacy interest, the Ninth Circuit noted that it was unclear whether Plaintiffs were subject to comprehensive physical examinations or if bus dispatchers or instructors have traditionally been subject to extensive regulation for safety. Gonzalez at 1022. Neither side presents evidence which indicates that bus dispatchers or instructors have been subject to extensive regulation for safety. Therefore, Plaintiffs do not have a diminished expectation of privacy due to regulation.

Ruben, unlike Denise, is subject to periodic medical examinations in order to keep his commercial driver's license. He must undergo a physical examination every two years, and must submit a urine sample for drug testing. Gil Decl. ¶ 35; Ruben Dep. 80-81. The physical exam tests his eyesight, blood pressure, and heart. Ruben Dep. 80-81. MTA uses the same contracted labs and procedures for the periodic testing as for the random drug testing. Gil Decl. ¶ 35. Ruben is required to have this commercial license as part of his job.

Ruben's medical exam is not as broad as that required of commercial truck drivers in Int'l Bhd. of Teamsters v. DOT,932 F.2d 1292 (9th Cir. 1991) . But Ruben does submit to urine drug tests. Therefore, Ruben does have a somewhat diminished expectation of privacy, even if not as great as that of commercial truck drivers.

B. The Character of the Intrusion

The Ninth Circuit could not evaluate the character of the intrusion because the testing procedures were not clear. Gonzalez,174 F.3d at 1022. As it turns out, these same testing procedures have previously been found to "carefully delimit the extent of the intrusion on individual privacy." Int'l Bhd. of Teamsters v. DOT, 932 F.2d 1292, 1299 (9th Cir. 1991) (involving drug testing by order of Federal Highway Administration which incorporates the Department of Transportation's drug testing procedures) .

In brief, the testing procedures are as follows: Employees are randomly selected for testing. Gil Decl. ¶ 10; 49 C.F.R. § 655.45(e)-(f). Urine samples are collected by medical professionals or others who have received proper training. 49 C.F.R. § 40.121. Urination occurs in a separate stall, room, or other partitioned area. Id. §§ 40.41, 40.63(d)(1), 40.67, 40.69. Direct observation of urination occurs only in narrow circumstances, such as where a particular employee has previously presented a sample outside of the normal temperature range or if a laboratory has determined that the last sample was diluted. Id. §§ 40.41, 40.63(d) (1), 40.67(a) (1), (c) (3). The records are protected and may only be disclosed in narrow circumstances. Plaintiffs' testimony confirms that the actual procedures are consistent with the regulations. Denise Dep. 73-82; Ruben Dep. 91-96.

In Vernonia, the students provided samples at either a urinal (male students) or enclosed stall (female students) with monitors in the bathroom. 515 U.S. 646, 658 (1995). The Court found that "[t]hese conditions are nearly identical to those typically encountered in public restrooms, which men, women, and especially schoolchildren use daily. Under such conditions, the privacy interests compromised by the process of obtaining the urine sample are in our view negligible." Id. The testing procedures at issue here provide a similar level of privacy, and indeed, Plaintiffs state in their opposition that "the tests were performed in the least intrusive way that such an intrusion could be performed." Opp'n at 17.

C. The Immediacy of the Government Concern and Efficacy of the Search

As to the nature of the governmental concern, the Ninth Circuit thought that it was unclear how testing dispatchers and instructors affects safety. Gonzalez, 174 F.3d at 1022. Another concern was whether the test was reasonably designed to catch drug users. Id. The court was also concerned with "the Bayes' theorem problem" which involves the reliability of a drug test where there is a low incidence of drug use in the tested population. Id. at 1023.

1. Government Concern

The government concern at issue is safety. The Ninth Circuit did not know "how testing employees in the positions at issue, instructor and dispatcher, affects safety" because it was not clear "what they do, and how being under the influence of alcohol or drugs when they do it might affect safety." Id. at 1022. We must consider how each Plaintiff's job duties affect safety, including the frequency with which each performs safety-sensitive functions. Defendants argue

that so long as an employee's job requires the performance of a safety-sensitive function as needed, the government concern is sufficient to warrant drug testing. We disagree, and the cases cited by Defendants do not compel such a sweeping rule.

In AFGE Local 1533 v. Cheney, 944 F.2d 503 (9th Cir. 1991), certain Navy employees holding Top Secret with Access security clearances challenged random drug testing, arguing that they were seldom, if ever, exposed to top secret information. Id. at 504-506. The court ruled that this argument "proves too much" as it called into question the determination that these employees needed such clearance, which was not challenged by the employees. Id. The court concluded that "[a] person with top secret clearance generates sufficiently grave potential risk to national security" to make drug testing reasonable. Id. (citing Hartness v. Bush, 919 F.2d 170, 172 (D.C. Cir. 1990)). The AFGE plaintiffs had access to top secret information which is defined as information "the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security." Id. at 504 (citations omitted). Even one error by a drug-influenced individual with top secret security access could result in exceptionally grave damage to national security. But an error by Plaintiffs cannot reasonably be expected to cause such damage, and so the governmental interest in drug testing here is much lower than in AFGE.

For similar reasons, Rushton v. Neb. Pub. Power Dist., 844 F.2d 562 (8th Cir. 1988), a pre-Skinner decision involving employees who sometimes work at a nuclear power plant, is fundamentally different because the harm caused by an accident at a nuclear power plant is far greater than that potentially caused by Plaintiffs.

Defendants also point to Am. Fed'n of Gov't Employees v. Roberts, 9 F.3d 1464 (9th Cir. 1993), where the court upheld random drug testing of Federal Bureau of Prisons ("Bureau") correctional employees because of the government's strong interest in preventing drug use among prisoners. Id. at 1467. Drug use by inmates leads to disruptive behavior, interferes with the rehabilitative process, and lowers public regard for Bureau officials. Id. The Bureau implemented random drug testing to detect drug smuggling by correctional employees into prisons. Employees who uses illicit drugs are more likely to take advantage of their contact with prisoners to smuggle drugs than those who do not. The correctional employees subject to testing had "the opportunity for contact with prisoners" on a daily or weekly basis for periods of one hour or more. Id. at 1466, 1468. In addition, employees who smuggle drugs can "reasonably be expected to have frequently" become drug users themselves. Id. at 1466. Smuggling drugs also allowed users to generate income and sustain their drug habit. Id. at 1467.

Plaintiffs' job functions provide few opportunities and no incentive to engage in conduct that presents a significant safety concern in the event they are under the influence of drugs. Unlike the regular and extended contact with prisoners in Roberts, Plaintiffs' job functions infrequently place them in positions where they can affect safety: Denise answered only three or four true emergency calls in a seventeen-year career; Ruben rarely drove a revenue service vehicle. Moreover, a correctional officer who uses drugs has an incentive to smuggle; MTA employees in Plaintiffs' positions who use drugs have no additional incentive to ignore emergency calls or become involved in automobile accidents. Therefore, Plaintiffs do not pose the same immediate risk to safety as prison employees who can take advantage of direct contact with prisoners.

Finally, Defendants point to FTA regulations which provide that an employee is "performing" a safety-sensitive function if "he or she is actually performing, ready to perform, or immediately available to perform such functions." 49 C.F.R. § 655.4; Defs.' May 29, 2001Supp. Memo. at 3, n.1. We agree that the FTA regulations require that Plaintiffs be tested as they both perform, or are ready to perform, safety-sensitive functions. However, we must determine whether these regulations, as applied to Plaintiffs, violate the Constitution.

We also note that, contrary to Defendants' assertions, consideration of the frequency of the performance of certain duties is not unworkable. The constitutionality of a drug testing regime does not depend upon the duties performed by a particular employee in a particular week. The constitutionality does not change in a particular week because, for example, Denise does or does not receive an emergency call. We look to the job as a whole. We focus upon Denise and Ruben's testimony regarding their own job duties in this case because Defendants provided the court with no other evidence of Plaintiffs' job duties.

Accordingly, while the government has a legitimate interest in promoting safety, we must consider the Plaintiffs' job duties, including the frequency or infrequency with which they perform safety-sensitive functions, when evaluating the strength of the government concern.

2. Plaintiff's Job Duties

The regulations at issue define "safety-sensitive function" as, among other things, "[o]perating a revenue service vehicle, including when not in revenue service" or "[c]ontrolling dispatch or movement of a revenue service

vehicle." We consider only Plaintiffs' job duties that fall within these regulations.

a. Denise

Denise was a Transit Operations Supervisor in Communications in the Bus Control Center. Her job as a dispatcher was primarily to maintain service. Denise Dep. 13:15. The dispatchers sit together in a room at separate consoles, but are very close to each other. Id. at 15-17. Calls would come in as lights on their screens. On a priority call, the bus driver would push a special button so that it would blink on the dispatcher's screen. Id. at 17:2-5. Consequently, the dispatchers must be "constantly monitoring to make sure that we didn't miss a blinking - you know, a blinking call." Id. at 16:16-17. There are two to fourteen dispatchers, and they can hear each other on calls, sometimes making it hard to hear. Id. at 22. An individual supervising the dispatchers is usually present. Id. at 28. Multiple calls could come in at any time, even multiple priority calls. Id. at 32. Written procedures outline how dispatchers should handle different emergencies. Id. at 56-57. Denise testified that she would call the police, on average, five or six times per week,[1] but that this would include calls about "non-trans" related events such as "drunks using vehicles to crush alum cans." Id. at corrections, page 104-05. She would also have to call an ambulance about the same number of times or less, but again mostly "non-MTA related events." Id. She testified that she had actual emergencies only three or four times in her entire seventeen-year career as a dispatcher. Id. at 94:10.

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[1] She originally said five or six times per month, but replaced "month" with "week" on her correction sheet. Her description of these calls as "non-trans" or "non-MTA" was also written on the correction sheet.

b. Ruben

Ruben was classified as both Transit Operations Supervisor ("TOS") – Instructor and TOS-Vehicle Operations Supervisor, performing duties for both positions. For both positions, Ruben is sometimes required to drive an MTA car or van. For example, as a Vehicle Operations Supervisor, Ruben drives a car or van for approximately four hours per day. As an Instructor, Ruben would investigate customer complaints and accidents approximately once a month by driving to the site in an MTA car or van. Under the regulations, however, driving a car or van is not considered safety-sensitive. 49 C.F.R. § 655.4. Therefore, we do not consider such activities in our analysis. We focus only upon those job functions which are safety-sensitive, namely driving a bus. Ruben testified that, between January 5, 1999 and January 5, 2000, he drove a bus for less than one hour. Ruben Decl. ¶ 5.

TOS-Instructors perform many duties, which apparently vary according to seniority and bidding. Ruben testified that as an Instructor, he "stayed in the office the majority of the time by doing the administrative work for the new employees that were released to us from the training center." Ruben Dep. 25:2-3. His duties in this function were, then, primarily administrative. As an Instructor, Ruben could be required to drive a bus along a new route, drive a bus to a special program, or drive an undamaged bus away from the scene of an accident. Id. at 21:1-9, 59:16-60:4. Instructors may also be required to work at the training center, demonstrating bus driving to new students. Id. at 17:18-25.

Ruben trained new drivers only for part of 1992 because he "had to be qualified in every aspect of the function." Id. at 40:2-3. Training new drivers involves taking them out in

buses, showing them the bus controls, and giving them a chance to drive the bus. Id. at 42-43. He did not train new drivers other than in 1992. Id. at 40:1-5. On one occasion as an Instructor, Ruben drove an empty bus to test a new seat that drivers were complaining about. Id. at 61:4-22.

Ruben could be required to drive a bus as a Vehicle Operations Supervisor if, for example, an operator became ill or there was an accident requiring an operator to be taken off a bus. Ruben Dep. at 14:23-15:2.

In practice in either position, Ruben has rarely driven a bus. Ruben testified that, as far as taking a bus out to try a new route, "[an Instructor] could do it. Most of the time we take a driver - an operator to do it." Ruben Dep. 21:1-6. He also stated that he never drove a bus to a special program. Id. at 21:15-23. If a bus is in an accident, but is not damaged, while an Instructor or Vehicle Operations Supervisor may drive the bus away, "more commonly [it] would be the mechanic" who would do so. Id. at 59:16-60:4. The one time Ruben drove a bus to test a driver's seat "was an unusual situation." Id. at 61:22.

3. Plaintiffs' Work Conditions

Whether an employee works alone or in a traditional office environment sometimes informs the determination of whether random drug testing is appropriate. For example, the fact that "[c]ommercial drivers work alone and unsupervised for substantial periods of time" bolstered the argument for drug testing in Teamsters, 932 F.2d at 1305; see also Von Raab, 489 U.S. at 674 (noting the difficulty of detecting drug impairment especially where employees are not subject to the "day-to-day scrutiny that is the norm in more traditional office environments"). In Skinner, the Federal Railroad

Administration specifically found that an impaired employee will seldom display any outward signs detectable by a lay person or even a physician in some cases. 489 U.S. at 628. Skinner involved post-accident, non-random testing. Here, Defendants have not presented any findings that their employees are unlikely to display outward signs of impairment. Though supervised work conditions will not alone make random drug testing unreasonable, the presence of such day-to-day scrutiny is an additional factor which may weaken an argument for random drug testing.

Denise works in a room with all of the other dispatchers, including a senior dispatcher who supervises the others. She has testified that if one of the dispatchers acted drunk "[e]verybody would notice" in "[a]bout two seconds." Denise Dep. 98:1-3. This factor, then, does not weigh in favor of testing Denise.

Ruben has testified that as Vehicle Operations Supervisor he is out in the field for approximately four hours per day. Ruben is alone in the car or van when performing this duty, which makes it difficult for the MTA to determine whether he is under the influence of drugs. Ruben Dep. 22:12. As an Instructor he does administrative work in what is presumably a more typical office setting. However, other people are likely to be around when Ruben is called upon to drive a bus in either position, such as after an accident. Therefore, this factor only marginally supports testing Ruben in his Vehicle Operations Supervisor position.

4. Immediacy

Another consideration is whether the particular government concern here is sufficiently immediate to dispense with the warrant, probable cause, and reasonable suspicion

requirements. Even where a warrantless search may be performed, the Fourth Amendment generally requires a showing of probable cause or at least reasonable suspicion. Skinner, 489 U.S. at 624. "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." Id.

Ruben and especially Denise have relatively high expectations of privacy. The government has not shown why its interest in safety would be jeopardized by requiring reasonable suspicion, as opposed to suspicionless random testing of Denise and Ruben. As explained above, other dispatchers would likely notice if Denise arrived at work under the influence of drugs. To a lesser extent, drug use by Ruben may also be detected before he could be called upon to drive a bus.

Though the reasonableness of the random drug testing at issue is not necessarily precluded by alternative less intrusive means, we should consider whether the immediacy in this case warrants random drug testing as opposed to other forms of testing. See id. at 629, n.9 ("the reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means") (citations omitted). When an employee always performs safety-sensitive functions, suspicion-based testing may well be too late to prevent significant harm. Plaintiffs perform tasks that impact safety very infrequently. Accordingly, the government's general interest in safety is neither heightened nor immediate within the context of our inquiry here. Given Plaintiffs' very limited impact on safety in their working environments, testing based on reasonable

suspicion would not jeopardize the government's interest in safety.

5. Reliability of the Testing Procedures

The testing procedures are quite reliable. The collection site personnel must verify that the tested person is the employee selected for testing. 49 C.F.R. § 40.61(c). All personal belongings, such as overcoats or briefcases, are taken away before the sample is provided. Id. at 40.61(f). To deter dilution of the specimens, the toilet water is dyed blue when possible and there is generally no running water in the enclosure where urination occurs. Id. at 40.41, 40.43. These protections all help to prevent individuals from bringing in a "clean" sample, having others take the test for them, or otherwise diluting the test.

MTA uses a split specimen testing procedure. The tested individual fills one container, and then the collection site personnel pour some of it into a second bottle in the presence of the tested individual. 49 C.F.R. §§ 40.171, 40.175. Only the primary specimen is tested. The sample is first screened with an immunoassay test. 49 C.F.R. 40.87. If it is negative, then the sample is reported as negative. If the screen comes up positive, then a gas chromatography/mass spectrometry ("GS/MS") test is done, which is currently the most reliable test generally used in laboratories. Id. at 40.41, 40.43; Snider Decl. at ¶ 17.

A medical review officer reviews all positives to look for other possible explanations, and will contact the employee to discuss such explanations. 49 C.F.R. §§ 40.121, 40.123, 40.129, 40.131, 40.135, 40.137, 40.141. An individual who tests positive may request that the split specimen be tested by a different laboratory. Id. at 40.153, 40.171, 40.201(e). If the

test of the split specimen does not confirm the first positive test, then the test is canceled. Id.

The regulations also require that employers provide blind specimens to labs. Blind specimens are urine samples provided to labs for quality control purposes. 49 C.F.R. § 40.3. They are given fictitious identifiers so that they are indistinguishable from employee samples. Id. The blind specimens are either blank, containing no drugs, or spiked with known quantities of specific drugs. Id. If an employer sends over 100 specimens a year to a laboratory, it must transmit a number of blind specimens equivalent to one percent of the specimens sent to that laboratory, and must investigate any discrepancy. Id. at 40.103, 105(a). If it is determined that a mistake was caused by a technological or methodological error, all samples that tested positive for the drug in question going backward to the last satisfactory blind sample performance test must be retested. Id. at 40.31(d)(8).[2] If the error was administrative (clerical, etc.) and there is reason to believe that the error was systemic, MTA may require re-analysis of previously run specimens. Id. at (d)(7). All false positives must be reported to the FTA. Id. at (d)(6), (d)(7), (d)(8). As of February 1, 2001, no false positives have been reported to the FTA since the regulations were first promulgated in 1994. Snider Decl. ¶ 14.

These procedures make this test very effective. Steps are taken to ensure that samples are not adulterated. Laboratories are required to consider alternate explanations for positive tests, and individuals may request a retest of the split

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[2] Though this section was repealed effective August 1, 2001, it has been substantially replaced with similar quality control measures.

specimen. In addition, blind samples are used for quality control purposes. The use of split specimen testing and blind samples also prevents the Bayes' Theorum problem discussed by the Ninth Circuit. Gonzalez, 174 F.3d at 1023. Here, false positives are adequately filtered out.

6. Documentation of Drug Use in the Industry

Plaintiffs argue that there is no official documentation of drug use among transit employees. Plaintiffs point to a 1991 DOT study of substance abuse in the transit industry which indicates that "the transit industry has been affected by the same substance abuse problems as those found in the general population." We have found no case which requires drug use be greater for tested employees than that in the general population. In fact, documentation of a drug problem within the industry is specifically not required. It merely bolsters the case. Chandler, 529 U.S. at 319; Von Raab, 489 U.S. at 673-75; Bluestein v. Skinner, 908 F.2d 451, 456 n.6 (9th Cir. 1990). Therefore, Defendants' failure to document drug use among transit employees does not preclude random drug testing. It is merely another factor to consider.

7. Whether Testing has Improved Safety

Plaintiffs also point to the fact that Defendants have not shown that the random drug tests have improved safety by reducing accidents or even drug use among transit employees. We have found no case which requires such a showing. Further, drug testing serves a deterrent purpose by discouraging employees from beginning drug use. Von Raab, 489 U.S. at 632. Defendants' failure to prove that the testing at issue has improved safety does not preclude drug testing.

D. Balancing the Above Considerations

We must judge the reasonableness of the search "by balancing the search's intrusion on the individual's Fourth Amendment interest against its promotion of legitimate governmental interests." Gonzalez, 174 F.3d at 1021. Random drug testing has been upheld for safety reasons in a number of circumstances. See Bluestein v. Skinner, 908 F.2d 451, 455-57 (9th Cir. 1990) (upholding random testing for persons holding safety-sensitive positions in the aviation industry, noting the harm caused by an airplane crash); Int'l Bhd. of Elec. Workers v. Skinner, 913 F.2d 1454, 1461-64 (9th Cir. 1990) (upholding random testing for employees engaged in natural gas, liquified natural gas, and hazardous liquid pipeline operations); Int'l Bhd. of Teamsters v. DOT, 932 F.2d 1292, 1305-06 (9th Cir. 1991) (upholding random drug testing of commercial truck drivers who operate trucks that weigh more than 26,000 pounds, carry fifteen or more passengers, or transport hazardous materials where drivers are subject to extensive regulation, comprehensive physical examinations and work alone for substantial periods of time); AFGE Local 1533 v. Cheney, 944 F.2d 503, 504-507 (9th Cir. 1991) (upholding random testing of Navy civilian employees who underwent detailed investigations before obtaining Top Secret with Access security clearance because unauthorized disclosure of top secret information "reasonably could be expected to cause exceptionally grave damage to the national security"); Am. Fed'n of Gov't Employees v. Roberts, 9 F.3d 1464, 1466-68 (9th Cir. 1993) (upholding random testing for correctional employees to prevent drug smuggling into prisons where employees had opportunity for contact with prisoners and a reduced expectation of privacy by the nature of their work). These cases all involve either a significant impact on safety with a risk of catastrophic results or a substantially reduced privacy interest.

We now consider the reasonableness of random drug testing as applied to the Plaintiffs in this case. We must be mindful that the issue in this case is not whether drug use impacts safety. We can all agree that it can. The question here is whether Plaintiffs' job duties are such that a governmental intrusion into their privacy is justified even in the absence of any cause or suspicion.

1. Denise

As discussed above, Denise's expectation of privacy is no more diminished than any other employee. Unlike truck drivers, employees with Top Secret security clearance access, and correctional employees, Denise has a relatively high expectation of privacy. On the other hand, the specific testing procedures at issue "carefully delimit the extent of the intrusion on individual privacy." Int'l Bhd. of Teamsters v. DOT, 932 F.2d 1292, 1299 (9th Cir. 1991) (involving drug testing by order of Federal Highway Administration which incorporates the Department of Transportation's drug testing procedures). In addition, the testing procedures are well designed to catch drug users, with procedures to prevent adulteration of samples. The use of split sample testing, medical officer review, and blind samples reduce the risk of false positives. These testing procedures weigh in favor of allowing the testing. However, proper testing procedures alone cannot justify drug testing of a government employee lest every government employee could be subject to testing as long as the testing procedures are similar to those used by DOT.

We must, then, consider how Denise impacts safety, and if the harm potentially caused by a dispatcher justifies the testing at issue. Denise testified that she would call the police five or six times per week and call an ambulance about the

same number of times, but that these were generally not related to MTA business and were not emergencies. She testified that she only dealt with true emergencies three or four times in her seventeen-year career as a dispatcher. Defendants do not submit any evidence to contradict Denise's testimony. In the emergency situations, Denise would typically just call the police or an ambulance. Denise Dep. at 95-97. There was one situation where Denise had to calm an upset bus driver. Id. at 49-50. Given the few emergency situations, Denise minimally impacts safety. In addition, Denise works in an environment with a number of people, typically including an individual supervising the dispatchers, who should be able to detect any drug use, and/or correct any action that might impair safety.

In light of the foregoing, and balancing all the relevant factors, random testing of Denise is not reasonable and violates the Fourth Amendment as applied to her. Her minimal and non-immediate impact on safety cannot justify the intrusion into her privacy. Therefore, Denise's cross-motion for summary judgment is granted and Defendants' motion is denied.

2. Ruben

Ruben does have a somewhat diminished expectation of privacy because he must undergo medical testing in order to keep his commercial driver's license. As described above, the testing procedures respect privacy as much as possible, and are reliable and accurate at detecting drug use. Ruben is required to drive a bus only under unusual circumstances, and in practice he has rarely done so. If Ruben were actively training new drivers, it may very well be reasonable to subject him to random testing. However, he has not performed that function since 1992. Given that Ruben is required to drive a

bus only sporadically and in unusual circumstances, his duties have a minimal impact on safety. Since other people are usually present(such as at an accident site) who could detect and/or remedy any potential dangerous situation, the government has little interest in randomly testing him.

Though Ruben has a lower expectation of privacy than Denise, it is still cognizable. His physical exam is not nearly as comprehensive as that required of commercial truck drivers. While his somewhat diminished expectation of privacy is a factor to consider, it does not justify the intrusion of random drug tests under these circumstances. Similarly, these circumstances do not suggest that safety would be compromised in any meaningful way absent suspicionless random testing. The intrusion into Ruben's privacy cannot be sustained given the non-immediate governmental interest. Random testing is not reasonable as applied to Ruben. Ruben is also entitled to summary judgment.

IV. Disposition

For all of the above reasons, Plaintiffs' motion for summary judgment is **GRANTED** and Defendants' motion for summary judgment is **DENIED**. Defendants shall not apply random drug testing to Plaintiffs in the jobs analyzed in this order. Counsel shall contact the court clerk to initiate a telephonic status conference with the court, within fourteen (14) days hereof, to discuss the status of this case in light of this order.

IT IS SO ORDERED

Initials of Deputy Clerk /s/_____

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 96-02785-GHK(AJWx)

[Filed Dec. 12, 2001]

S. DENISE GONZALEZ, an individual, and RUBEN C. GONZALEZ, an individual, Plaintiffs	)
vs.	)
METROPOLITAN TRANSPORTATION AUTHORITY, et al., Defendants.	)

ORDER RE: PERMANENT INJUNCTION AND STAY PENDING APPEAL

On November 6, 2001, we ordered the parties to brief whether a permanent injunction should be issued based on our October 26, 2001 summary judgment order, and whether to stay further proceedings pending the resolution of any appeal from the permanent injunction. We directed Plaintiffs to file their brief by November 20, 2001. "Plaintiffs' failure to submit a brief as ordered . . . will be treated as their

abandonment of any objection to the issuance of a permanent injunction and a stay . . . ." Min. Ord. (Nov. 6, 2001).

As of December 11, 2001, we have received no such briefing on behalf of Plaintiffs. Based on our October 26, 2001 order granting Plaintiffs' motion for summary judgment, we hereby **PERMANENTLY ENJOIN** Defendants from applying random drug testing to Plaintiffs in the positions analyzed therein. Because Defendants expressed a desire for immediate appellate review of our grant of injunctive relief, Defendants shall notify the court, in writing, when they have filed their notice of appeal. Upon receipt of such notification, all further proceedings shall be **STAYED** pending appeal. If, within thirty (30) days hereof, Defendants fail to notify the court of their filing of a notice of appeal, the court will assume Defendants have abandoned an immediate appeal of the injunction. In that event, we will set a status conference to discuss resolution of any remaining issues.

IT IS SO ORDERED

/s/_____
George H. King
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 96-2785-GHK(AJWx)

[Filed May 17, 2001]

S. Denise Gonzalez, et al.
Plaintiffs,

v.

Metropolitan Transportation Authority, et al.,
Defendants.

PRESENT: Hon. George H. King, United States District Judge

PROCEEDINGS: Supplemental Briefing re: Mootness

At the April 23, 2001 hearing on Defendants' motion for summary judgment, Defendants argued that Plaintiffs' claims had become moot as they had moved to Arizona. Defendants have deposed Plaintiffs and filed supplemental briefing on the mootness issue. We note initially that a change of residence would not render Plaintiffs' damages claims moot, so our mootness discussion applies only to Plaintiffs' request for

injunctive relief. See Harris v. Itzhaki, 185 F.3d 1043, 1050 (9th Cir. 1999).

Plaintiffs sold their California condominium in March 2000 and purchased a home in Arizona in August 2000. Ruben Dep. at 8:8-9, 19:19-21. However, Ruben has evenly split his time between California and Arizona since that time, and he maintains a California driver's license and voter registration. Id. at 20-21, 25:11-19. Most importantly, he returned to work at the Metropolitan Transportation Authority in early May. Id. at 25:20-25; Defendants' Supplemental Memorandum at 4, n.3. Therefore, his claims are clearly not moot.

Denise, however, spends most of her time in Arizona. Since August of 2000, she has spent only ten to twelve nights in California. Denise Dep. at 16:21-22. She has an Arizona driver's license and is registered to vote in Arizona. Id. at 18:6-10, 19:16-17. Denise also testified than she would return to her job if the court were to find the testing unconstitutional. Id. at 29:3-9. Denise's move to Arizona does not moot her claim given her stated intent to return to her job. The cases cited by Defendants involve a plaintiff who only had an intent to return to his prior residence at some unspecified time in the future, which raised a separate ripeness issue. See Hein v. Arkansas State University, 972 F.Supp. 1175, 1182 n.3 (E.D. Ark. 1997); Monahan v. State of Nebraska, 687 F.2d 1164, 1168 (8th Cir. 1982). Here, however, Denise has unequivocally stated that she will return to her job, and move back to Los Angeles, if her job becomes available to her.

Plaintiffs' claims are not moot. We will, therefore, reach the merits of Defendants' summary judgment motion. As discussed at the April 23, 2001 hearing and in light of Plaintiffs' statement that they also seek summary judgment,

Opposition at 6, n.3, we will regard Defendants' pending motion as cross-motions for summary judgment. While we feel that Defendants have had "a full and fair opportunity to ventilate the issues involved in the motion" under Cool Fuel, Inc. v. Connett, 685 F.2d 309, 312 (9th Cir. 1982), we will nonetheless allow Defendants an additional ten (10) days to file any additional opposition to the cross-motion for summary judgment. Defendants shall not make any arguments or file any evidence which has already been filed in support of Defendants' motion for summary judgment. If Defendants fail to make a supplemental filing within ten (10) days, we will consider the cross-motions upon the current record. Defendants shall deliver a courtesy copy of any supplemental filing to chambers.

IT IS SO ORDERED

Initials of Deputy Clerk /s/_____

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 96-56808

[Filed April 14, 1999]

S. DENISE GONZALEZ, an individual; RUBEN C. GONZALEZ, an individual, *Plaintiffs-Appellants*,	)
v.	)
METROPOLITAN TRANSPORTATION AUTHORITY, a.k.a. Southern California Rapid Transit District; JOSEPH E. DREW, in his official capacity as present Chief Executive Officer/General Manager and as an individual; FRANKLIN WHITE, in his official capacity as past Chief Executive Officer/General Manager and as an individual; RAY INGE, in his official capacity as present Director of Human Resources and as an individual; JERRY GIVENS, in	)

his official capacity as past)
Director of Human Resources and)
as an individual,)
Defendants-Appellees.)
)

Appeal from the United States District Court
for the Central District of California
James M. Ideman, District Judge, Presiding

Argued and Submitted
March 6, 1998—Pasadena, California

Before: Robert Boochever and Andrew J. Kleinfeld, Circuit Judges, and Jack E. Tanner,[1] District Judge.

Opinion by Judge Kleinfeld.

OPINION

KLEINFELD, Circuit Judge:

This is a Constitutional challenge to random urine tests for bus dispatchers and instructors.

Facts.

This case was dismissed with prejudice on a Rule 12(b)(6) motion, so we evaluate the complaint de novo to decide whether it states a claim upon which relief could be granted,

[1] The Honorable Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.

if the facts alleged were proved. *Idaho Sporting Congress, Inc. v. United States Forest Service*, 92 F.3d 922 (9th Cir. 1996). The constitutionality of agency drug testing regulations is reviewed *de novo*. *International Bhd. of Teamsters v. Department of Transp.*, 932 F.2d 1292, 1298 (9th Cir. 1991).

According to the complaint, Mr. and Mrs. Gonzalez both work for the municipal bus service in Los Angeles. Mrs. Gonzalez is a radio dispatcher, Mr. Gonzalez an instructor. Their employer, the Los Angeles County Metropolitan Transportation Authority, conducts random unannounced testing for drugs and alcohol pursuant to the federal Omnibus Transportation Employee Testing Act of 1991 and regulations thereunder. 49 U.S.C. § 5331; 49 C.F.R. Part 653-54.

Mrs. Gonzalez was subjected to a urine test at a medical facility pursuant to the policy. The test came out negative, but the process was so upsetting to her, according to the complaint, that she needed medical treatment and was unable to return to work afterward. She was a victim of child abuse, which made her unusually sensitive to interference with her bodily privacy. Mr. Gonzalez has not been tested, but is upset both by what happened to his wife and by the prospect of being tested himself.

According to the complaint, the tests are based on the classification of both their jobs as "safety-sensitive," but that classification cannot be justified. Also, the tests are not accurate enough to be justifiable to serve any public purpose, nor are there any screening procedures to protect unusually sensitive people like Mrs. Gonzalez.

The complaint claims that the tests amount to an unconstitutional search, violative of the Fourth Amendment, and also Article I, sections 1 and 13, of the Constitution of the

State of California. Suit is brought under 42 U.S.C. § 1983 against the Metropolitan Transportation Authority, its past and present general managers, and its past and present officials in charge of implementing the testing program. The prayer is for a declaratory judgment that the testing program is unconstitutional facially and as applied, damages for lost earnings and emotional distress, and an injunction to prohibit testing Mr. and Mrs. Gonzalez pursuant to the program.

The district court ruled that (1) federal regulations requiring urine testing of employees implicate the Fourth Amendment under *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989), because they invade reasonable expectations of privacy, as plaintiffs argued; (2) reasonableness under the Fourth Amendment is evaluated by balancing the intrusiveness of the test against the government interest satisfied by testing, under *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989); (3) but the federal regulations requiring random testing of employees such as plaintiffs satisfy the balancing test. Defendants' motion to dismiss was accordingly granted with prejudice.

Analysis.

I. The regulations.

The Transit Authority argues that the urine tests can properly be required of Mr. and Mrs. Gonzalez under duly authorized federal regulations. The Gonzalezes argue that their jobs do not properly fit under the "safety sensitive personnel" definition under the regulation, or if they do, the definition is broader than the statute permits.

The statute requires the Secretary of Transportation to issue regulations for random testing and to make the decision which categories of employees are to be treated as "safety-sensitive" and tested. Congress required the Secretary to issue regulations "to conduct . . . random testing of mass transportation employees responsible for safety-sensitive functions *(as decided by the Secretary)* for the use of a controlled substance . . . and to conduct . . . random . . . testing of such employees for the use of alcohol . . . ." 49 U.S.C. § 5331(b)(1)(A) (emphasis added).[2]

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[2] **§ 5331. Alcohol and controlled substances testing**

(b) Testing program for mass transportation employees. (1)(A) In the interest of mass transportation safety, the Secretary shall prescribe regulations that establish a program requiring mass transportation operations that receive financial assistance under section 5307, 5309, or 5311 of this title or section 103(e)(4) of title 23 to conduct preemployment, reasonable suspicion, random, and post-accident testing of mass transportation employees responsible for safety-sensitive functions (as decided by the Secretary) for the use of a controlled substance in violation of law or a United States Government regulation, and to conduct reasonable suspicion, random, and post-accident testing of such employees for the use of alcohol in violation of law or a United States Government regulation. The regulations shall permit such operations to conduct preemployment testing of such employees for the use of alcohol.

(B) When the Secretary of Transportation considers it appropriate in the interest of safety, the Secretary may prescribe regulations for conducting periodic recurring testing of mass transportation employees responsible for safety-sensitive functions (as decided by the Secretary) for

The regulations define "safety-sensitive function" to include anyone who operates a "revenue service vehicle" such as a city bus, "including when not in revenue service." 49 C.F.R. § 653.7; 49 C.F.R. § 654.7. That may cover Mr. Gonzalez, described by the complaint as a "Transit Operations Supervisor-Instructor." We understand from the briefs and oral argument that he supervises trainees who drive buses without passengers on board. The definition also includes "controlling dispatch or movement of a revenue service vehicle." *Id.* That covers Mrs. Gonzalez, a bus dispatcher. As an instructor, Mr. Gonzalez is "controlling. . . movement" of a bus when he is monitoring a trainee who is driving an empty bus.[3] Thus the federal regulations required

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the use of alcohol or a controlled substance in violation of law or a Government regulation.

49 U.S.C. § 5331(b).

[3] *Safety-sensitive function* means any of the following duties:

(1) Operating a revenue service vehicle, including when not in revenue service;

(2) Operating a nonrevenue service vehicle, when required to be operated by a holder of a Commercial Driver's License;

(3) Controlling dispatch or movement of a revenue service vehicle;

(4) Maintaining a revenue service vehicle or equipment

the municipal bus system to test Mr. and Mrs. Gonzalez, and the Department of Transportation was authorized by the statute to issue the regulations. The only serious question is whether the regulations are constitutionally permissible as applied to Mr. and Mrs. Gonzalez.

II. Jurisdiction.

The Transit Authority argues that the court lacked jurisdiction over the Gonzalezes' challenge because they did not join the Federal Transit Administration and the Department of Transportation, and these entities are indispensable parties under Federal Rule of Civil Procedure 19. This contention is incorrect. Whether a party is necessary and indispensable is a pragmatic and equitable judgment, not a jurisdictional one. *Simpson v. Alaska State Comm'n for Human Rights*, 608 F.2d 1171, 1174-75, 1175 n.5 (9th Cir. 1979); 7 Wright, Miller & Kane, Federal Practice & Procedure §§ 1601, 1603 (1986). If the complaint otherwise states a claim, there is no apparent reason why these parties could not be joined, and it is for the district court initially to decide whether joinder is appropriate and feasible.

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used in revenue service, unless the recipient receives section 3 funding and is in an area of less than 50,000 in population or section 18 funding and contracts out such services; or

(5) Carrying a firearm for security purposes.

49 C.F.R. § 653.7.

III. Qualified immunity.

Appellees argue that all the individual defendants should be dismissed because they are entitled to qualified immunity, and would have had no reason to think that administering the urine tests was unconstitutional. The district court did not reach the issue of what claims for relief if any would be subject to qualified immunity, because it dismissed the case for failure to state a claim. Accordingly, we need not decide whether, for example, the damages claims would fail because of qualified immunity. Of course good faith that would shield individuals from damages judgments would not avoid prospective relief based on unconstitutionality of the regulation as applied, were that to be the correct result.

IV. Constitutionality.

The Gonzalezes argue that the regulations, insofar as their positions are included as "safety-sensitive," reach further than the Fourth Amendment permits. They claim, basically, that what they do affects safety so little, and the tests are of so little utility to protecting public safety, that the interference with their privacy cannot be justified. Thus for municipal bus service to subject them to urine tests is, they argue, an unreasonable search and seizure.

Collection and testing of urine pursuant to government directive is a search under the Fourth Amendment. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989). The reasons are that urine tests can reveal private medical facts, and that "the process of collecting the sample to be tested, which may in some cases involve the visual or aural monitoring of the act of urination, itself implicates privacy interests." *Id.*; *see also National Treasury Employees Union v. Von Raab*, 489 U.S.

656, 665, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989). For a warrantless search of this sort to be reasonable, usually some quantum of individualized suspicion has been required, though that is not necessary to reasonableness. *Skinner*, 489 U.S. at 624. In the absence of individualized suspicion, the reasonableness of such a search depends on balancing the "special needs" of the government against the extent of the intrusiveness of the testing procedure. *Chandler v. Miller*, 520 U.S. 305, 318, 117 S. Ct. 1295, 137 L. Ed. 2d 513 (1997).

The urine testing cases decided by the Supreme Court over the last decade have gone both ways depending on their quite particularized facts. *Skinner*, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989), the first of this line of authority, dealt with blood and urine tests of railway employees who had been involved in train crashes or safety rule violations. The Court discussed a century of alcohol problems among railway employees, and a study indicating that "23% of the operating personnel were 'problem drinkers.'" *Id.* at 607 n.1. The urine tests were held to be constitutional, because the urine collection procedure was appropriate, employees' reasonable expectations of privacy were diminished by their participation in an industry pervasively regulated for safety, and the persons tested "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences" and can "cause great human loss before any signs of impairment become noticeable to supervisors or others." *Id.* at 628.

Treasury Employees, which came down the same day, held that urine testing of some Customs Service employees was constitutionally permissible, but the testing of others might not be, depending on further development of the facts. Those who sought promotion to positions involving drug

interdiction or carrying a firearm could be tested. But whether the Customs Service could also test employees required to "handle classified material" was remanded, because inclusion of such positions as "animal caretaker" and "accounting technician" raised "the question whether the Service had defined this category of employees more broadly than is necessary." *Id.* at 678.

In *Vernonia School District v. Acton*, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995), drug testing of student athletes was held to be constitutionally permissible. The Court reasoned that "children . . . committed to the temporary custody of the State as schoolmaster" lacked some of the most fundamental rights of self-determination and privacy, and that athletes who ordinarily showered together had even less of an expectation of privacy. Further, the urine was collected in circumstances intruding no more on privacy than urinating in a public restroom ordinarily did, and information obtained from the urine and disclosure of that information were sharply limited.

Chandler v. Miller, 520 U.S. 305, 117 S. Ct. 1295, 137 L. Ed. 2d 513 (1997) held that it was unconstitutional to require candidates for state public office to subject themselves to urine tests. Though the tests and results were conducted with full privacy and the candidates could control dissemination of the results, there was no evidence that the state was afflicted with drug-abusing officeholders, and the testing procedure was not likely to be effective for screening out drug abusing candidates. The testing protected a state interest in symbolism and image rather than safety, an insufficient basis for the warrantless searches without individualized suspicion.

We have also decided a few urine testing cases. *Bluestein v. Skinner*, 908 F.2d 451 (9th Cir. 1990), upholds random drug testing of flight crew members. *International Bhd. of Teamsters v. Department of Transportation*, 932 F.2d 1292 (9th Cir. 1991), upholds the constitutionality of drug testing for bus and commercial truck drivers. In *Railway Labor Executives v. Skinner*, 934 F.2d 1096 (9th Cir. 1991), we upheld random testing of railroad workers, even without a crash or safety violation.

We are unable, on the record before us, to determine whether our precedents upholding testing are controlling or distinguishable. This case went to judgment on a pleading which did not exclude the possibility that facts might be proved under it, pursuant to which the urine testing would be unconstitutional. Each of our own decisions may be distinguishable, depending on the facts as they are further developed in the case at bar. In *Bluestein*, testing was limited to employees whose impairment would cause physical risk to passengers, and the test procedure was designed to assure reasonable balancing of accuracy, privacy, and dignity. But here we do not yet know whether dispatchers and instructors would cause physical risk to passengers if impaired, because we do not know exactly what they do, and we know little about the testing procedure. In *Teamsters*, we did not address the issue of testing dispatchers and instructors, we were able to ascertain how the tests were done and how much they impinged on privacy, and we noted that truck drivers were already subjected to extremely invasive physical examinations including urinalysis even without the challenged procedure. What was critical in *Teamsters* was that the persons tested could be impaired "behind the wheel." *Teamsters*, 932 F.2d at 1304. The employees at issue in the case at bar apparently do not get behind the wheel. In *Railway Executives*, unlike the

case at bar, we had a record establishing how the tests were done, so that we could evaluate accuracy, privacy and dignity.

Vernonia School District v. Acton, 515 U.S. 646, 653, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995), holds that reasonableness is judged by balancing the search's intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. *Vernonia* holds that the factors to be considered are: (1) the nature of the privacy interest upon which the search intrudes; (2) the character of the intrusion; (3) the immediacy of the government concern and the efficacy of the search for meeting it. *Id.* at 654-64. We lack the factual record to perform the *Vernonia* evaluation. As to "nature of the privacy interest," the municipal bus authority employees obviously are not children with a reduced privacy interest, as in *Vernonia*, and the record does not establish whether bus dispatchers and other transit employees are subject even without the urine tests to the kind of comprehensive physical examinations that were a factor in *Teamsters*, 932 F.2d at 1300. The record does not establish whether, as in *Skinner*, bus dispatchers and instructors have traditionally been subject to extensive regulation for safety.

Vernonia holds that we are next to consider the "character of the intrusion," because urine testing "intrudes upon 'an excretory function traditionally shielded by great privacy.'" *Vernonia*, 515 U.S. at 658. We do not know whether, as in *Vernonia,* the bus employees are tested in "conditions nearly identical to those typically encountered in public restrooms," *Id.* at 658, or what other procedures may be used.

The next *Vernonia* factor is "the nature and immediacy of the governmental concern and the efficacy of this means for meeting it." *Vernonia*, 515 U.S. at 660. Obviously the

government concern with preventing accidents involving municipal buses is very great. In a Third Circuit case on bus drivers, the transit authority "presented extensive evidence of a severe drug abuse problem among its operating employees," *Transport Workers' Union v. Southeastern Pennsylvania Transp. Auth.*, 884 F.2d 709, 711 (3d Cir. 1988), but no evidence has been presented in the case at bar. But with a record limited to the complaint in this case, it would be possible for the evidence to establish efficacy or inefficacy.

One issue of efficacy is that the complaint does not establish how testing employees in the positions at issue, instructor and dispatcher, affects safety. It does not show exactly what they do, and how being under the influence of alcohol or drugs when they do it might affect safety. So far as we can tell, neither appellant drives a bus. It may be that the risk to public safety is great, because even though they are not behind the wheel, these employees can greatly increase the risk of an accident by those who are, as for example a drunk mechanic might. But it is also possible that plaintiffs can prove that dispatchers and instructors are no more of a threat to public safety than the animal handlers in *Treasury Employees* or the holders of high public office in *Chandler*. We understand from the briefs and argument that a dispatcher sits in a booth and talks on a microphone, telling drivers where more buses are needed and gives directions so a bus driver can get there. Possibly their duties make them as dangerous if drunk on duty as drunk air traffic controllers would be. On the other hand, buses go a lot slower than airplanes, so the air traffic controller comparison might not be apt. It is also possible that a drunk dispatcher is no more dangerous to public safety than a gas station attendant who gives an inquiring motorist mistaken directions, or a drunk shipping clerk who sends out ten of something when only one was ordered. It is conceivable that the one time of the day that

a drunk dispatcher does not threaten public safety is when on the job, because he or she is then assuredly off the road. The record does not compel either inference at this stage.

The other aspect of efficacy is whether the tests are reasonably designed to accomplish their objective, and that too is subject, on the limited record before us, to proof either way. It does not show whether the tests are adequately designed to catch those who should fail them, by such means as surprise and monitoring to avoid deception. The inefficacy of the drug tests on candidates, performed by appointment with no monitoring, was among the reasons why they were unconstitutional in *Chandler*, 520 U.S. at 319-20. Without some sort of monitoring and surprise, workers who do drink and use drugs regularly can substitute clean urine for their own, rendering the indignity on all the clean workers pointless.

A more complete record can also illuminate another aspect of efficacy, the Bayes' theorem problem that affects any random test given to a low incidence population. Nothing in this world is perfect. Suppose the combination of errors in the tests, including containers marked with someone else's name or number than the person who urinated into them, typographical errors in the reports of test results and identifications of which employees produced which results, anomalous chemical reactions with other substances in people's bodies such as medications and foods, and other random errors, cause an error rate such that one person out of 500 gets a report of "dirty" urine when it was actually "clean." Suppose that there is a high rate of alcohol drug use among the employees (in *Skinner* the Court found it relevant to note that the employees had a 23% "problem drinkers" rate), and on any particular day one worker in 10 has alcohol or drugs in his blood. Then with a 1/500 false positive rate,

out of 1,000 tests, 2 will be positive even though the employee's urine was clean, and 100 will be positive correctly. Only one of the positives out of every 51 is false. Fifty out of 51 are accurate. That is a fairly effective test, in terms of reliability.

But if the workers are generally "clean," the reliability of the test goes way down. Suppose on a particular day only one worker in 500 has ingested drugs or alcohol. Then with a 1/500 false positive rate, out of 1,000 tests, 2 will be correct positives and 2 will be false positives. Half the employees who get a "dirty" urinalysis report are unjustly categorized. A positive result is as likely to be false as true on so clean a population, even though the test is identical to the one that was quite effective for a population with a higher incidence of drug and alcohol usage.

Thus the data on the extent of the drug and alcohol problem is useful not only for evaluating whether "the nature and immediacy of the governmental concern," *Vernonia*, 515 U.S. at 660, justifies the testing, but also for evaluating whether the tests achieve reasonable efficacy in distinguishing those who have used alcohol or drugs from those who have not. This is not to say that a low rate of alcoholism or drug use necessarily bars testing. The low rate may result from the success of the test in deterring alcohol and drug abuse, and the false positives may be filtered out more or less adequately by a second test. *See Treasury Employees*, 489 U.S. at 656 n.3. But we need a record to determine whether the burden of false positives on those so classified, and the indignity of the testing on all those subjected to it, so outweighs the value of the testing as to make the testing an unreasonable search in the absence of any individualized suspicion.

Congress, in providing for mass transportation funding, unquestionably can constitutionally limit use of its funds in such a way as to keep drunk bus drivers off the street. But the use of random urine testing involves a search which must be "reasonable" in order to satisfy the Fourth Amendment. It is not enough to say that the test is performed in a doctor's office. We also take off all our clothes, wear gowns open in the back, and allow strangers to touch and probe our bodies in a doctor's office; that does not mean that the government can compel us to do these things without individualized suspicion.

We cannot simply defer to the administrative agency's determination that dispatchers perform a "safety-sensitive function." If that were the proper way to resolve the constitutional question, then the Supreme Court would have deferred *Treasury Employees* to the Treasury Department determination that employees who handled classified materials performed safety-sensitive functions. Instead, the Court remanded that case "to assess the reasonableness of the Government's testing program insofar as it covers employees who are required 'to handle classified material'" because the record "raises in our minds the question whether the Service has defined this category of employees more broadly than is necessary." *Treasury Employees*, 489 U.S. at 677-78.

Conclusion.

The tests challenged by Mr. and Mrs. Gonzalez and the regulations pursuant to which they were performed address a serious concern. But the record is inadequate to determine whether, as applied in this case, they address it in a constitutional manner. We do not know, from the record we have, whether the employees at issue would pose a substantial immediate threat to public safety if impaired by drugs or

alcohol, or whether the procedure for testing them would be reasonably effective for finding out if they are impaired, or whether the tests as performed were an undue invasion of their privacy. Facts might be proved under the complaint which would entitle plaintiffs to relief. Accordingly we **REVERSE** and **REMAND**

APPENDIX G

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 96-2785 JMI (JRx)

[Filed Oct. 21, 1996]

S. DENISE GONZALEZ, et al., Plaintiffs,	)
v.	)
METROPOLITAN TRANSPORTATION AUTHORITY, et al., Defendants.	)

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS WITH PREJUDICE

IT IS HEREBY ORDERED:

Defendants Metropolitan Transportation Authority ("MTA"), et al.'s Motion to Dismiss came before this Court for review on September 16, 1996. After careful consideration and review, the Court hereby GRANTS Defendants' motion.

BACKGROUND

Plaintiffs, Denise Gonzalez and Ruben Gonzalez, have brought suit against their employer Defendant MTA and four current and former management employees, Defendants Joseph E. Drew, Franklin White, Ray Inge and Jerry Givens. Denise Gonzalez holds the position of Transportation Operations Supervisor - Communications and is a radio dispatcher in the Bus Control Center. Ruben Gonzalez holds the position of Transportation Operations Supervisor-Instruction.

The Omnibus Transportation Employee Testing Act of 1991 ("Act"), requires the Department of Transportation ("DOT") to implement drug and alcohol testing programs in various transportation industries. The Federal Transit Administration ("FTA") is a DOT agency and, as such, is required to conduct drug and alcohol testing programs. 49 C.F.R. §§ 40.1, 40.3.

The Act directs the FTA to require recipients of federal funds to test safety-sensitive employees for the prohibited use of controlled substances. The Act directs the FTA to require four kinds of drug testing: pre-employment, reasonable suspicion, random and post accident, and permits the FTA to require periodic drug testing. The Act further directs the FTA to require a post-accident test when there has been a loss of human life.

The FTA's drug and alcohol program mandates the testing of safety-sensitive employees. Federal regulations define "safety-sensitive" function to mean any of the following duties:

(1) Operating a revenue service vehicle, including when not in revenue service;
(2) Operating a non-revenue service vehicle, when required to be operated by a holder of a Commercial Driver's License;
(3) Controlling dispatch or movement of a revenue service vehicle;
(4) Maintaining a revenue vehicle or equipment used in revenue service, unless the recipient receives section 3 funding and is in an area of less than 50,000 in population or section 18 funding and contracts out such services; or
(5) carrying a firearm for security purposes.

49 C.F.R. §§ 653.7, 654.7.

Pursuant to said federal regulations, on January 1, 1995, Defendant MTA promulgated a new drug and alcohol policy which initiated random testing of employees who perform safety-sensitive functions. The job functions of Transportation Operations Supervisors have been classified as safety sensitive by the MTA. Therefore, as Transportation Operations Supervisors, both Plaintiffs are subject to the MTA's drug and alcohol policy. On April 18, 1995, pursuant to the random testing provision, Plaintiff Denise Gonzalez was tested.

Plaintiffs contend their civil rights have been, and continue to be, violated by the April 18, 1995 test of Plaintiff Denise Gonzalez and the fact that both continue to be subject to random testing. Plaintiffs contend that random testing violates their civil rights to privacy and freedom from unreasonable searches and seizures and further assert that they are not "safety sensitive" employees under Supreme Court precedent.

DISCUSSION

Defendants contend that the random testing provision of the MTA drug and alcohol policy is mandated by federal law and that Plaintiffs' positions with the MTA fall within the category of "safety sensitive." Therefore, as a matter of law, Defendants assert that Plaintiffs perform safety-sensitive functions and are correctly subject to random testing.

Plaintiffs acknowledge that their job descriptions do fall within the "safety sensitive" definitions of the FTA guidelines, but vigorously dispute the implied claim that their jobs are in fact "safety sensitive" as defined by the United States Supreme Court. Plaintiffs correctly argue that Congress cannot pass any law, i.e. the Omnibus Act, that makes unconstitutional behavior into constitutional behavior. Only a change in the Constitution can do that.

The United States Supreme Court has held that federal regulations requiring employees to produce urine samples for chemical testing implicate the Fourth Amendment, as those tests invade reasonable expectations of privacy. Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 616-618, 109 S. Ct. 1402, 1412-1413 (1989). Thus, the urine test at issue in this case must be deemed a search under the Fourth Amendment. Defendants note, however, that individuals only have a right to be secure against unreasonable searches and seizures, not all searches and seizures.

Defendants maintain that recent Supreme Court decisions have set forth a balancing test in which the intrusiveness of the testing is balanced against the government's interest served by the testing. See Id.; National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S. Ct. 1384 (1989). Under this test, Defendants assert that the Supreme Court has

upheld even random testing as constitutionally permissible in order to serve the important governmental interest of ensuring public safety. Id. In the instant case, Defendants argue that the legitimate interest in public safety which has generated the FTA regulations mandating random testing justifies the invasion of privacy alleged by Plaintiffs. See Defendants' Motion to Dismiss, p. 8.

The court agrees with Defendants. The FTA's definition of job functions that classify Plaintiffs as safety sensitive, and thus subject to random drug testing, is reasonable as a matter of law and therefore does not violate either the United States or the California Constitution. Plaintiffs' Complaint is dismissed with prejudice in its entirety.

IT IS SO ORDERED.

DATED: October 18, 1996

/s/_____
JAMES M. IDEMAN
United States District Judge

APPENDIX H

UNITED STATES CODE

TITLE 49. TRANSPORTATION

SUBTITLE III. GENERAL AND INTERMODAL PROGRAMS

CHAPTER 53 MASS TRANSPORTATION

49 USC § 5331 (1996)

§ 5331 Alcohol and controlled substances testing

(a) Definitions. In this section--

(1) "controlled substance" means any substance under section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 802) whose use the Secretary of Transportation decides has a risk to transportation safety.

(2) "person" includes any entity organized or existing under the laws of the United States, a State, territory, or possession of the United States, or a foreign country.

(3) "mass transportation" means any form of mass transportation, except a form the Secretary decides is covered adequately, for employee alcohol and controlled substances testing purposes, under section 20140 or 31306 of this title.

(b) Testing program for mass transportation employees.

(1) (A) In the interest of mass transportation safety, the Secretary shall prescribe regulations that establish a program requiring mass transportation operations that receive financial assistance under section 5307, 5309, or 5311 of this title or section 103(e) (4) of title 23 to conduct preemployment, reasonable suspicion, random, and post-accident testing of mass transportation employees responsible for safety-sensitive functions (as decided by the Secretary) for the use of a controlled substance in violation of law or a United States Government regulation, and to conduct reasonable suspicion, random, and post-accident testing of such employees for the use of alcohol in violation of law or a United States Government regulation. The regulations shall permit such operations to conduct preemployment testing of such employees for the use of alcohol.

(B) When the Secretary of Transportation considers it appropriate in the interest of safety, the secretary may prescribe regulations for conducting periodic recurring testing of mass transportation employees responsible for safety-sensitive functions (as decided by the Secretary) for the use of alcohol or a controlled substance in violation of law or a Government regulation.

(2) In prescribing regulations under this subsection, the Secretary of Transportation--

(A) shall require that post-accident testing of such a mass transportation employee be conducted when loss of human life occurs in an accident involving mass transportation; and

(B) may require that post-accident testing of such a mass transportation employee be conducted when bodily injury or significant property damage occurs in any other serious accident involving mass transportation.

(c) Disqualifications for use.

(1) When the Secretary of Transportation considers it appropriate, the Secretary shall require disqualification for an established period of time or dismissal of any employee referred to in subsection (b)(1) of this section who is found--

(A) to have used or been impaired by alcohol when on duty; or

(B) to have used a controlled substance, whether or not on duty, except as allowed for medical purposes by law or regulation.

(2) This section does not supersede any penalty applicable to a mass transportation employee under another law.

(d) Testing and laboratory requirements. In carrying out subsection (b) of this section, the Secretary of Transportation shall develop requirements that shall--

(1) promote, to the maximum extent practicable, individual privacy in the collection of specimens;

(2) for laboratories and testing procedures for controlled substances, incorporate the Department of Health and Human Services scientific and technical guidelines dated April 11, 1988, and any amendments to those guidelines, including mandatory guidelines establishing--

(A) comprehensive standards for every aspect of laboratory controlled substances testing and laboratory procedures to be applied in carrying out this section, including standards requiring the use of the best available technology to ensure the complete reliability and accuracy of

controlled substances tests and strict procedures governing the chain of custody of specimens collected for controlled substances testing;

(B) the minimum list of controlled substances for which individuals may be tested; and

(C) appropriate standards and procedures for periodic review of laboratories and criteria for certification and revocation of certification of laboratories to perform controlled substances testing in carrying out this section;

(3) require that a laboratory involved in controlled substances testing under this section have the capability and facility, at the laboratory, of performing screening and confirmation tests;

(4) provide that all tests indicating the use of alcohol or a controlled substance in violation of law or a Government regulation be confirmed by a scientifically recognized method of testing capable of providing quantitative information about alcohol or a controlled substance;

(5) provide that each specimen be subdivided, secured, and labeled in the presence of the tested individual and that a part of the specimen be retained in a secure manner to prevent the possibility of tampering, so that if the individual's confirmation test results are positive the individual has an opportunity to have the retained part tested by a 2d confirmation test done independently at another certified laboratory if the individual requests the 2d confirmation test not later than 3 days after being advised of the results of the first confirmation test;

(6) ensure appropriate safeguards for testing to detect and quantify alcohol in breath and body fluid samples, including urine and blood, through the development of regulations that may be necessary, and in consultation with the Secretary of Health and Human Services;

(7) provide for the confidentiality of test results and medical information (except information about alcohol or a controlled substance) of employees, except that this clause does not prevent the use of test results for the orderly imposition of appropriate sanctions under this section; and

(8) ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances.

(e) Rehabilitation. The Secretary of Transportation shall prescribe regulations establishing requirements for rehabilitation programs that provide for the identification and opportunity for treatment of any mass transportation employee referred to in subsection (b)(1) of this section who is found to have used alcohol or a controlled substance in violation of law or a Government regulation. The Secretary shall decide on the circumstances under which employees shall be required to participate in a program. This subsection does not prevent a mass transportation operation from establishing a program under this section in cooperation with another mass transportation operation.

(f) Relationship to other laws, regulations, standards, and orders.

(1) A State or local government may not prescribe, issue, or continue in effect a law, regulation, standard, or order that

is inconsistent with regulations prescribed under this section. However, a regulation prescribed under this section does not preempt a State criminal law that imposes sanctions for reckless conduct leading to loss of life, injury, or damage to property.

(2) In prescribing regulations under this section, the Secretary of Transportation--

(A) shall establish only requirements that are consistent with international obligations of the United States; and

(B) shall consider applicable laws and regulations of foreign countries.

(3) This section does not prevent the Secretary of Transportation from continuing in effect, amending, or further supplementing a regulation prescribed before October 28, 1991, governing the use of alcohol or a controlled substance by mass transportation employees.

(g) Ineligibility for assistance. A person is not eligible for financial assistance under section 5307, 5309, or 5311 of this title section 103(e)(4) of title 23 if the person is required, under regulations the Secretary of Transportation prescribes under this section, to establish a program of alcohol and controlled substances testing and does not establish the program.

APPENDIX I

CODE OF FEDERAL REGULATIONS

TITLE 49 -- TRANSPORTATION

SUBTITLE B -- OTHER REGULATIONS RELATING TO TRANSPORTATION

CHAPTER VI -- FEDERAL TRANSIT ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

PART 653 -- PREVENTION OF PROHIBITED DRUG USE IN TRANSIT OPERATIONS

SUBPART A -- GENERAL

49 CFR 653.1

653.1 Overview

49 CFR 653.1

(a) This part describes the anti-drug program to be implemented by a recipient of certain funding from the Federal Transit Administration.

(b) The part includes six subparts. Subpart A covers the general requirements of the FTA anti-drug program. Subpart B specifies the basic requirements of each employer's anti-drug program, including the types of tests to be conducted,

and the elements required to be in each employer's drug testing program. Subpart C describes the different types of drug tests to be conducted. Subpart D describes a new drug testing procedural requirement mandated by the Act. Subpart E contains administrative matters such as reports and recordkeeping requirements. Subpart F specifies how a recipient certifies compliance with the rule.

TITLE 49 -- TRANSPORTATION

SUBTITLE B -- OTHER REGULATIONS RELATING TO TRANSPORTATION

CHAPTER VI -- FEDERAL TRANSIT ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

PART653 -- PREVENTION OF PROHIBITED DRUG USE IN TRANSIT OPERATIONS

SUBPART A -- GENERAL

49 CFR 653.7

653.7 Definitions.

As used in this part --

Accident means an occurrence associated with the operation of a vehicle, if as a result --

(1) An individual dies;

(2) An individual suffers a bodily injury and immediately receives medical treatment away from the scene of the accident;

(3) With respect to an occurrence in which the mass transit vehicle involved is a bus, electric bus, van, or automobile, one or more vehicles incurs disabling damage as the result of the occurrence and is transported away from the scene by a tow truck or other vehicle;

(4) With respect to an occurrence in which the mass transit vehicle involved is a rail car, trolley car, trolley bus, or vessel, the mass transit vehicle is removed from revenue service.

Administrator means the Administrator of the Federal Transit Administration or the Administrator's designee.

Anti-drug program means a program to detect and deter the use of prohibited drugs as required by this part.

Canceled test means a test that has been declared invalid by a Medical Review Officer. It is neither a verified positive nor a verified negative test, and includes a specimen rejected for testing by a laboratory.

Certification means a recipient's written statement, authorized by the organization's governing board or other authorizing official, that the recipient has complied with the provisions of this part. (See § 653.77 for certification requirements.)

Chain-of-custody means the procedures in part 40 of this title concerning the handling of a urine specimen.

Consortium means an entity, including a group or association of employers, operators, recipients, subrecipients, or contractors, which provides drug testing as required by this part, or other DOT drug testing rule, and which acts on behalf of the employer.

Contractor means a person or organization that provides a service for a recipient, subrecipient, employer, or operator consistent with a specific understanding or arrangement. The understanding can be a written contract or an informal

arrangement that reflects an ongoing relationship between the parties.

Covered employee means a person, including an applicant or transferee, who performs a safety-sensitive function for an entity subject to this part; however, a volunteer is covered only if operating a vehicle designed to transport sixteen or more passengers, including the driver.

Disabling damage means damage which precludes departure of a motor vehicle from the scene of the accident in its usual manner in daylight after simple repairs.

(1) Inclusion. Damage to motor vehicles that could have been driven, but would have been further damaged if so driven.

(2) Exclusions.

(i) Damage which can be remedied temporarily at the scene of the accident without special tools or parts.

(ii) Tire disablement without other damage even if no spare tire is available.

(iii) Headlamp or taillight damage.

(iv) Damage to turn signals, horn, or windshield wipers which makes them inoperative.

DOT means the United States Department of Transportation.

DOT agency means an agency (or "operating administration") of the United States Department of

Transportation administering regulations requiring drug testing (see parts 199, 219, 382, and 653 of this title; 14 CFR part 121, Appendix J; 33 CFR part 95; and 46 CFR parts 4 and 16).

Employer means a recipient or other entity that provides mass transportation service or which performs a safety-sensitive function for such recipient or other entity. This term includes subrecipients, operators, and contractors.

FTA means the Federal Transit Administration, an agency of the U.S. Department of Transportation.

Large operator means a recipient or subrecipient primarily operating in an urbanized area of 200,000 or more in population.

Medical Review Officer (MRO) means a licensed physician (medical doctor or doctor of osteopathy) responsible for receiving laboratory results generated by an employer's drug testing program who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual's confirmed positive test result together with his or her medical history and any other relevant biomedical information.

Positive rate means the number of positive results for random drug tests conducted under this part plus the number of refusals of random tests required by this part, divided by the total number of random drug tests conducted under this part plus the number of refusals of random tests required by this part.

Prohibited drug means marijuana, cocaine, opiates, amphetamines, or phencyclidine.

Railroad means all forms of non-highway ground transportation that run on rails or electromagnetic guideways, including (1) commuter or other short-haul rail passenger service in a metropolitan or suburban area, as well as any commuter rail service which was operated by the Consolidated Rail Corporation as of January 1, 1979, and (2) high speed ground transportation systems that connect metropolitan areas, without regard to whether they use new technologies not associated with traditional railroads. Such term does not include rapid transit operations within an urban area that are not connected to the general railroad system of transportation.

Recipient means an entity receiving Federal financial assistance under section 3, 9, or 18, of the FT Act, or under section 103(e)(4) of title 23 of the United States Code.

Refuse to submit means that a covered employee fails to provide a urine sample as required by 49 CFR Part 40, without a genuine inability to provide a specimen (as determined by a medical evaluation), after he or she has received notice of the requirement to be tested in accordance with the provisions of this part, or engages in conduct that clearly obstructs the testing process.

Safety-sensitive function means any of the following duties:

(1) Operating a revenue service vehicle, including when not in revenue service;

(2) Operating a nonrevenue service vehicle, when required to be operated by a holder of a Commercial Driver's License;

(3) Controlling dispatch or movement of a revenue service vehicle;

(4) Maintaining a revenue service vehicle or equipment used in revenue service, unless the recipient receives section 3 funding and is in an area of less than 50,000 in population or section 18 funding and contracts out such services; or

(5) Carrying a firearm for security purposes.

Small operator means a recipient or subrecipient primarily operating in a nonurbanized area or in an urbanized area of less than 200,000 in population.

Vehicle means a bus, electric bus, van, automobile, rail car, trolley car, trolley bus, or vessel. A mass transit vehicle is a vehicle used for mass transportation or for ancillary services.

Verified negative (drug test result) means a drug test result reviewed by a medical review officer and determined to have evidence of prohibited drug use.

Verified positive (drug test result) means a drug test result reviewed by a medical review officer and determined to have evidence of prohibited drug use.